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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

By I. W. HART
(Ex-officio Reporter)

VOLUME 30

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1918

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ALFRED BUDGE, Chief Justice.....January 2, 1917
JOHN C. RICE, Justice.....Elected 1916

District Judges.

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E. C. STEELE, 2d District.....Re-elected 1914
CARL A. DAVIS, 3d District.....Re-elected 1914
C. P. MCCARTHY, 3d District.....Elected 1914
W. A. BABCOCK, 4th District.....Elected 1914
HENRY F. ENSIGN, 4th District..Appointed² July 2, 1917
J. J. GUHEEN, 5th District..Appointed³ November 28, 1914
R. M. TERRELL, 5th District.Appointed² February 21, 1917
F. J. COWEN, 6th District.....Elected 1914
ED. L. BRYAN, 7th District.....Re-elected 1914
ISAAC F. SMITH, 7th District..Appointed² March 23, 1917
R. N. DUNN, 8th District.....Re-elected 1914
J. M. FLYNN, 8th District.....Re-elected 1914
J. G. GWINN, 9th District.....Elected 1914
W. N. SCALES, 10th District....Appointed⁴ March 26, 1917

OFFICERS OF THE COURT.

Clerk.

I. W. HART.....Appointed April 15, 1907

Attorney General.

T. A. WALTERS.....Elected 1916

¹ To fill vacancy created by death of Justice Stewart.

² In accordance with Act providing additional judge for that district.

³ To fill vacancy created by resignation of Judge Alfred Budge.

⁴ In accordance with Act establishing Tenth Judicial District.

ATTORNEYS ADMITTED FROM JANUARY 1, 1917, TO DECEMBER 1, 1917.

ANDERSON, WALTER H.	March	17, 1917
ALLER, CAPTAIN CHARLES	April	2, 1917
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CARNEY, JOSEPH T.	Jan.	24, 1917
COTANT, CHAS. T.	Sept.	4, 1917
DILLON, BENJAMIN J.	Feb.	28, 1917
DINGLE, WILLIAM B.	May	2, 1917
DEE, JAMES E.	Sept.	8, 1917
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FENN, LLOYD A.	May	18, 1917
GREENWOOD, JAMES A.	May	18, 1917
GROOM, PERCY	August	27, 1917
GLEESON, JOHN M.	Nov.	5, 1917
HARRIS, HENSLEY G.	Jan.	30, 1917
HACKMAN, TURNER K.	Feb.	24, 1917
HAYS, SAMUEL D.	May	2, 1917
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HEINZ, WILLIAM J. M.	Sept.	5, 1917
HARRISON, LESTER S.	Nov.	12, 1917
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KEDNEY, VAUSE A.	Sept.	10, 1917
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LOUFBOURBOW, WILLIAM C.	Sept.	10, 1917
MYER, JOHN H.	Jan.	23, 1917
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McFARLAND, ROBERT E., JR.	May	8, 1917
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MORRIS, THOMAS M.	August	27, 1917
MUNLY, MICHAEL G.	Sept.	18, 1917
MORTON, JOSEPH F.	Nov.	5, 1917
O'BRIEN, WILLIAM H.	Jan.	11, 1917
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PLUMMER, W. H.	Nov.	12, 1917
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RAMAGE, THOMAS	Sept.	14, 1917
STACKEY, WRIGHT	Feb.	3, 1917
STEVENS, JESSE G.	Sept.	8, 1917
SIMON, CHAS.	Sept.	8, 1917
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WARD, CLARENCE T.	Sept.	5, 1917

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CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF IDAHO.

(March 18, 1916.)

MARSH MINING COMPANY, a Corporation, Respondent,
v. INLAND EMPIRE MINING & MILLING COM-
PANY, a Corporation, Appellant.

[165 Pac. 1128.]

EMINENT DOMAIN—REASONABLE NECESSITY—PROPERTY ALREADY DEVOTED TO PUBLIC USE—MORE NECESSARY PUBLIC USE—MINES AND MINING PURPOSES.

1. If a reasonable although not an absolute necessity exists to take private property for a public use, the power of eminent domain may be invoked.

2. Property devoted to or held for a public use is subject to the power of eminent domain if the right to so take it is given by constitutional provision or legislative enactment, in express terms or by clear implication, but it cannot be taken to be used in the same manner and for the same purpose to which it is already being applied or for which it is, in good faith, being held, if by so doing that purpose will be defeated.

3. The theory upon which the power of eminent domain is extended in aid of the mining industry is that public benefit will result from the application of private property to public use. It was not the intention of the framers of the constitution, nor of the legislature, that this power be so invoked that the mine will be developed and thereby another be destroyed, nor that one mine owner be enriched and another impoverished. The aid of eminent domain is extended to the industry, not to the individual.

4. Chapter 3, title 8, of the Civil Code points out the occasions when, the conditions under which and the methods and agencies whereby the use of mining property may be appropriated in aid of the mining industry and, the purposes for which it may be so

Argument for Appellant.

appropriated having been specified, it follows that, unless it is being applied by its owner to or in good faith held for the same or a more necessary public use which will be defeated or seriously interfered with thereby, it may be taken in aid of that industry, under the power of eminent domain, for one or more of those designated purposes and none other.

[As to condemnation of mining property under point of eminent domain, see note in *Ann. Cas.* 1912D, 1002.]

APPEAL from the District Court of the the First Judicial District, for Shoshone County. Hon. John M. Flynn, Presiding Judge.

Action to condemn a portion of a patented mining claim for mining purposes. Judgment for plaintiff. *Reversed.*

Chas. E. Miller and I. N. Smith, for Appellant.

Where property is sought to be taken by condemnation, if upon the hearing there is a total lack of competent evidence, or none at all, to prove the existence of the public necessity for the taking, and a taking is decreed, such decision and decree operate to take the defendant's property without due process of law and in violation of the fourteenth amendment of the federal constitution. (*State of Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 32 Sup. Ct. 535, 56 L. ed. 863.)

The evidence fails to establish a necessity for the taking of the property sought to be condemned. (*Scranton Gas & Water Co. v. Northern Coal & Iron Co.*, 192 Pa. St. 80, 73 Am. St. 798, 43 Atl. 470.)

Property once appropriated to a public use cannot be taken unless for a more necessary public use than that to which it has been already appropriated. (*Portneuf Irr. Co. v. Budge*, 16 Ida. 116, 18 Ann. Cas. 674, 100 Pac. 1046; *State ex rel. Harbor Boom Co. v. Superior Court*, 65 Wash. 129, 117 Pac. 755; *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670; *State ex rel. Skamania Boom Co. v. Superior Court*, 47 Wash. 166, 91 Pac. 637; *Boston & M. R. R. v. Lowell & L. R. Co.*, 124 Mass. 368; *Housatonic R. Co. v. Lee & H. R.*

Argument for Appellant.

Co., 118 Mass. 391; *Baltimore & Ohio & Chicago R. Co. v. North*, 103 Ind. 486, 3 N. E. 144; *Pittsburgh Junction R. Co.'s Appeal*, 122 Pa. St. 511, 9 Am. St. 128, 6 Atl. 564; *St. Paul Union Depot Co. v. City of St. Paul*, 30 Minn. 359, 363, 15 N. W. 684; *Barre R. Co. v. Montpelier & W. R. R. Co.*, 61 Vt. 1, 15 Am. St. 877, 17 Atl. 923, 4 L. R. A. 785; *In re City of Buffalo*, 68 N. Y. 167; *In re New York, L. & W. Ry. Co.*, 99 N. Y. 12, 23, 1 N. E. 27; *Birmingham & A. A. R. Co. v. Louisville & N. R. Co.*, 152 Ala. 422, 44 So. 679; *St. Louis I. M. & S. R. Co. v. Memphis D. & G. R. Co.*, 102 Ark. 492, 143 S. W. 107; *Reclamation Dist. v. Superior Court*, 151 Cal. 263, 90 Pac. 545; *Chicago & N. W. Ry. Co. v. Chicago & E. R. Co.*, 112 Ill. 589; *Steele v. Empson*, 142 Ind. 397, 41 N. E. 822; *Chicago R. I. & P. Ry. Co. v. Williams*, 148 Fed. 442; *St. Louis H. & K. C. Ry. Co. v. Hannibal Union Depot Co.*, 125 Mo. 82, 28 S. W. 483; *Paterson & R. R. Co. v. City of Paterson*, 81 N. J. L. 75, 80 Atl. 937; *Miller v. Cincinnati L. & A. Elec. St. R. Co.*, 43 Ind. App. 540, 88 N. E. 102; *New York Central & H. R. R. Co. v. City of Buffalo*, 200 N. Y. 113, 93 N. E. 520; *St. Louis & S. F. R. Co. v. City of Tulsa*, 213 Fed. 87; *Oregon-Wash. R. & Nav. Co. v. Castner*, 66 Or. 580, 135 Pac. 174; *Ruthland Ry., L. & P. Co. v. Clarendon Power Co.*, 86 Vt. 45, 83 Atl. 332, 44 L. R. A., N. S., 1204; *Kanawha Central R. Co. v. Broun*, 71 W. Va. 738, 77 S. E. 360.)

“Two conditions must concur in order to authorize such taking. There must be some necessity therefor on the part of the condemnor, and the taking must not destroy or seriously impede the use to which the property is already devoted.” (Lewis on Eminent Domain, 3d ed., sec. 440, p. 796; *Oregon Short Line R. Co. v. Postal Tel. Cable Co.*, 111 Fed. 842, 49 C. C. A. 663; *Portland Ry., L. & Power Co. v. City of Portland*, 181 Fed. 632, 633; *Pacific Postal Telegraph-Cable Co. v. Oregon & Cal. R. Co.*, 163 Fed. 967; *Little Miami etc. R. Co. v. City of Dayton*, 23 Ohio St. 510; *City of Ft. Wayne v. Lake Shore & M. S. Ry. Co.*, 132 Ind. 558, 32 Am. St. 277, 32 N. E. 215, 18 L. R. A. 367; *Baltimore & O. S. W. Ry. Co.*

Argument for Respondent.

v. Board of Commrs., 156 Ind. 260, 58 N. E. 837, 59 N. E. 856.)

The grant in sec. 5210, Rev. Codes, of the right to condemn for "an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit or conduct of tailings or refuse matter from their several mines," and the grant in sec. 3224 of the right of condemnation of an easement over and upon mining lands for purposes therein enumerated, excludes the implication of a grant of power for any other purpose. (*Scranton Gas & Water Co. v. Northern Coal & Iron Co.*, 192 Pa. St. 80, 73 Am. St. 798, 43 Atl. 470; *Fayetteville Street Ry. v. Aberdeen & R. R. Co.*, 142 N. C. 423, 9 Ann. Cas. 683, 55 S. E. 345; *Southern Ry. Co. v. Memphis*, 126 Tenn. 267, Ann. Cas. 1913E, 153, 148 S. W. 662; 41 L. R. A., N. S., 828.) It is immaterial that appellant has not yet reached the point in its development where all of this land is required for immediate use. (*Kansas City S. & G. Ry. Co. v. Vicksburg S. & P. Ry. Co.*, 49 La. Ann. 29, 21 So. 144.)

John P. Gray and Therrett Towles, for Respondent.

The constitution has declared that the necessary use of lands for mining uses is a public use, and the legislature has provided the procedure for subjecting such lands as are necessary for such use thereto. The constitution in this particular is self-executing. (*Washington Water Power Co. v. Waters*, 19 Ida. 595, 115 Pac. 682; *Potlatch Lumber Co. v. Peterson*, 12 Ida. 769, 118 Am. St. 233, 88 Pac. 426; *Washington Water Power Co. v. Waters*, 186 Fed. 572; *Lamborn v. Bell*, 18 Colo. 346, 32 Pac. 989, 20 L. R. A. 241; *Spratt v. Helena Power Trans. Co.*, 37 Mont. 60, 94 Pac. 631.)

Sec. 14, art. 1, is a limitation of power upon the legislature and not a grant of power. (*Portneuf Irr. Co. v. Budge*, 16 Ida. 116, 18 Ann. Cas. 674, 100 Pac. 1046.)

"The legislature, neither by neglect to act nor by legislation, can nullify a mandatory provision of the constitution." (*Day v. Day*, 12 Ida. 556, 10 Ann. Cas. 260, 86 Pac. 531; *Davis v. Burke*, 179 U. S. 399, 21 Sup. Ct. 210, 45 L. ed. 249.)

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That such a use is a public use is firmly settled. (*Strickley v. Highland Boy Gold Min. Co.*, 200 U. S. 527, 4 Ann. Cas. 1174, 26 Sup. Ct. 301, 50 L. ed. 581; *Douglass v. Byrnes*, 59 Fed. 29; *Dayton Gold & Silver Min. Co. v. Seawell*, 11 Nev. 394; *Overman Silver Min. Co. v. Corcoran*, 15 Nev. 147; *Clark v. Nash*, 198 U. S. 361, 4 Ann. Cas. 1171, 25 Sup. Ct. 676, 49 L. ed. 1085; *Hand Gold Min. Co. v. Parker*, 59 Ga. 419; *Baillie v. Larson*, 138 Fed. 177; *Butte A. & P. Ry. Co. v. Montana Union Ry. Co.*, 16 Mont. 504, 50 Am. St. 508, 41 Pac. 232, 31 L. R. A. 298.)

Under the evidence there can be no doubt that the lands sought to be acquired are necessary for the purposes of the respondent. There is no other available ground that the Marsh Mining Co. can acquire, and the ground which it has and the facilities which it has are entirely inadequate and insufficient. (*Overman Silver Min. Co. v. Corcoran*, 15 Nev. 147.)

The use being a public use and the necessity existing, the peculiar character of the appellants' property does not preclude its condemnation. (*Colorado Eastern R. Co. v. Union Pac. R. Co.*, 41 Fed. 293-300; 15 Cyc. 614, and cases cited; 2 Lewis on Eminent Domain, 3d ed., 754; *North Carolina etc. R. Co. v. Carolina Cent. Ry. Co.*, 83 N. C. 489; *Butte A. & P. Ry. Co. v. Montana Union Ry. Co.*, 16 Mont. 504, 50 Am. St. 508, 41 Pac. 232, 31 L. R. A. 298; *Seattle & M. R. Co. v. Bellingham Bay & E. R. Co.*, 29 Wash. 491, 92 Am. St. 907, 69 Pac. 1107; *Atchison T. & S. F. R. Co. v. Kansas City M. & O. Ry. Co.*, 67 Kan. 569, 70 Pac. 939-942, 73 Pac. 899; *St. Louis A. & T. H. R. Co. v. Belleville City Ry. Co.*, 158 Ill. 390, 41 N. E. 916; *Scranton Gas & Water Co. v. Delaware L. & W. R. Co.*, 225 Pa. St. 152, 73 Atl. 1097; *Atlanta & W. P. R. Co. v. Atlanta B. & A. R. Co.*, 124 Ga. 125, 52 S. E. 320; *Pansing v. Village of Miambsburg*, 79 Ohio St. 430, 87 N. E. 1139.)

MORGAN, J.—Respondent is the owner of certain mining claims known as the Marsh Group, situated in Leland Mining District, Shoshone county. Appellant is the owner of a pat-

ented mining claim known as the Never Sweat Lode, which contains between eleven and twelve acres. The land embraced within the Marsh Group and all that embraced within the Never Sweat, except a small portion which is comparatively level, lying along a stream called Canyon Creek, is situated upon steep mountainsides. This action was commenced by respondent in order to acquire for mining purposes, under the power of eminent domain, the surface of approximately three and one-third acres of appellant's ground including all the level portion above mentioned. The level land sought to be condemned is occupied by certain persons who claim adversely to appellant by reason of occupancy, or otherwise, and who were made defendants in the action.

The record discloses that while the respondent has never paid a dividend, it has done a great deal of development work and has mined from its claims and marketed about \$550,000 worth of ore; that it has discovered in said claims a valuable deposit of mineral; that in the development of its property its present facilities have become and are inadequate to meet its requirements, and that by reason of the topography of its ground it needs the level portion of appellant's land in order to facilitate its mining operations.

It is alleged in the complaint that respondent needs this land for the purposes of constructing a tramway thereon, for terminal facilities for tracks, ground for ore-bins, machine-shops, ore-sorting plant, sheds for timber, stull-yards, land for dumping waste rock and for other necessary mining uses and purposes in connection with the operation and development of its property.

The trial resulted in a judgment decreeing that the use to which respondent desires to put the land is a public use and awarding to it the right to condemn and appropriate said land under the power of eminent domain. This appeal is from the judgment.

Appellant contends that the acquisition of the property is a matter of convenience and economy, only, on the part of respondent, and that no such necessity exists therefor as warrants the exercise of the right of eminent domain. While the

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record does not disclose that an absolute necessity exists for taking the land by respondent and does disclose that it may operate, to some extent, without it, we are convinced from a careful examination of the evidence that for the convenient and economical development and operation of its mine the use of the land is needed and that a reasonable necessity exists for the taking. If a reasonable, although not an absolute, necessity exists to take property for a public use, it is sufficient. (*City of Spokane v. Merriam*, 80 Wash. 222, 141 Pac. 358; *State ex rel. Skamania Boom Co. v. Superior Court*, 47 Wash. 166, 91 Pac. 637; *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670; *Bennett v. City of Marion*, 106 Iowa, 628, 76 N. W. 844; *Cincinnati etc. Ry. Co. v. City of Anderson*, 139 Ind. 490, 47 Am. St. 285, 38 N. E. 167; *Mobile & G. R. Co. v. Alabama etc. Ry. Co.*, 87 Ala. 501, 6 So. 404; *Butte A. & P. Ry. Co. v. Montana Union Ry. Co.*, 16 Mont. 504, 50 Am. St. 508, 41 Pac. 232, 31 L. R. A. 298.)

It appears that appellant and its predecessors have expended about \$20,000 in the development of the Never Sweat claim; that while ore in paying quantities has never been discovered, some ore has been found and that appellant is still prospecting, in good faith, and expending its money in an effort to develop a mine, and also that if commercial ore in paying quantities is discovered in the Never Sweat claim, all the level ground sought to be condemned will be necessary to its owner in its development and operation for the same use to which respondent seeks to appropriate it. It further appears that the predecessors in interest of appellant, some years ago, used a portion of the level land in question for the purpose of piling or storing some mining timbers upon it and also dumped thereon a small quantity of waste rock, and that no use has been made of it since for mining purposes. That at about the time this use was made of the land an injunction, which is still in force, was served upon appellant's predecessors preventing such use of it, and that there is litigation now pending between appellant and others which has grown out of adverse claims to surface rights to the land.

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Appellant contends, and the record discloses, that the property is owned and held by it for the same public use and purpose to which respondent desires to put it, to wit, mining purposes, and it insists that if it is deprived of this land, the development of the remaining portion of its property may as well cease, since without the level land the successful operation of its mine will be impossible.

Property devoted to, or held for, a public use is subject to the power of eminent domain if the right to so take it is given by constitutional provision or legislative enactment, in express terms or by clear implication, but it cannot be taken to be used in the same manner and for the same purpose to which it is already being applied or for which it is, in good faith, being held, if by so doing that purpose will be defeated. (Lewis on Eminent Domain, 3d ed., sec. 440; *State ex rel. Skamania Boom Co. v. Superior Court*, *supra*; *Samish River Boom Co. v. Union Boom Co.*, *supra*; *State ex rel. Harbor Boom Co. v. Superior Court*, 65 Wash. 129, 117 Pac. 755; *Atchison, T. & S. F. R. Co. v. Kansas City M. & O. R. Co.*, 67 Kan. 569, 70 Pac. 939, 73 Pac. 899; *Southern Pac. R. Co. v. Southern Cal. Ry. Co.*, 111 Cal. 221, 43 Pac. 602; *Cary Library v. Bliss*, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765; *Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. Ry. Co.*, 76 Minn. 334, 79 N. W. 315; *Oregon Short Line R. Co. v. Postal Tel. Cable Co.*, 111 Fed. 842, 49 C. C. A. 663; *Little Miami & C. & X. R. Co. v. City of Dayton*, 23 Ohio St. 510.)

An examination of the constitution and statutes of Idaho discloses that authority has not been granted, either expressly or by implication, to take, under the power of eminent domain, property already devoted to mining purposes for some of the uses to which it is sought to put the property of appellant. Sec. 14, art. 1 of the constitution provides: "The necessary use of lands . . . for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps or other necessary means to their complete development . . . is hereby declared to be a public use, and subject to the regulation and control of the state."

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It will be observed that this section of the constitution provides that the necessary use of lands for certain mining purposes is a public use and is subject to the regulation and control of the state, but it must be remembered that the tract here in controversy is now held by appellant for those purposes, and the constitution makes no reference to the taking of property held for, or devoted to, a public use for the purpose of applying it to the same or any other use.

The supreme court of Massachusetts, in *Boston & Maine R. R. v. Lowell & Lawrence R. Co.*, 124 Mass. 368, said: "The general principle is well settled, and has been applied in a great variety of cases, that land already legally appropriated to a public use is not to be afterward taken for a like use, unless the intention of the legislature that it should be so taken has been manifested in express terms or by necessary implication." (*Baltimore & Ohio & Chicago R. Co. v. North*, 103 Ind. 486, 3 N. E. 144; *Atlanta etc. R. Co. v. Atlanta etc. R. Co.*, 124 Ga. 125, 52 S. E. 320; *In re City of Buffalo*, 68 N. Y. 167; *Portland Ry., Light & Power Co. v. City of Portland*, 181 Fed. 632.)

Sec. 5210, Rev. Codes, provides: "Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses: . . . 4. Roads, tunnels, ditches, flumes, pipes and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter for mines; also, an occupancy in common with the owners or possessors of different mines of any place for the flow, deposit or conduct of tailings or refuse matter from their several mines." It is provided in sec. 5212, Rev. Codes: "The private property which may be taken under this title includes: . . . 3. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated"; and sec. 5213, provides: "Before property can be taken, it must appear: . . . 3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use."

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It is true the respondent's mine is more fully developed than is that of appellant, and that the former corporation is, by reason of its discovery of commercial ore in paying quantities, operating upon a larger scale than is the latter, but this is not the test to be applied in construing the foregoing sections of the code. This court said in case of *Portneuf Irr. Co. v. Budge*, 16 Ida. 116, 18 Ann. Cas. 674, 100 Pac. 1046, as follows: "Certainly the fact that the proposed canal will irrigate 20,000 acres, while the plaintiff's canal only irrigates 2,500 acres, does not make it a more necessary public use." (*Cary Library v. Bliss*, 151 Mass. 364, 7 L. R. A. 765, 25 N. E. 92; *West River Bridge v. Dix*, 6 How. (47 U. S.) 507, 12 L. ed. 535; *Chicago & N. W. Ry. Co. v. Chicago & E. R. Co.*, 112 Ill. 589.) In other words, the necessity is not measured by the extent to which the use is applied. (*Butte A. & P. Ry. Co. v. Montana Union Ry. Co.*, 16 Mont. 504, 50 Am. St. 508, 41 Pac. 232, 31 L. R. A. 298; *Talbot v. Hudson*, 16 Gray (Mass.), 417; *Kettle River R. Co. v. Eastern Ry. Co.*, 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111; *Hibernia R. Co. v. De Camp*, 47 N. J. L. 518, 54 Am. Rep. 197, 4 Atl. 318.)"

The theory upon which eminent domain, a power inherent in the state, is extended in aid of the mining industry is that public benefit will result from the application of private property to public use. The end sought to be attained is that mines be discovered, developed and operated, and that thereby the wealth of the state and the prosperity of its inhabitants be augmented. The welfare of this state depends, largely, upon the development of its natural resources, and the discovery of mineral, in paying quantities, in an undeveloped mine is of as vital importance to it and to its present and future inhabitants as is the successful operation of a mine now developed. It was not the intention of the framers of the constitution, nor of the legislature, that the power of eminent domain be so invoked that one mine will be developed and thereby another be destroyed, nor that one mine owner be enriched and another be impoverished. The aid of eminent domain is extended to the industry, not to the individual.

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Provision has been made whereby the owners of mines and mining claims, less advantageously located than those of others, cannot be excluded from their properties nor prevented from developing and operating them. Chap. 3, Title 8, of the Civil Code points out the occasions when, the conditions under which and the methods and agencies whereby the use of mining property may be appropriated in aid of the mining industry, and secs. 3223 and 3224 are as follows:

“3223. The owner, locator, or occupant of a mining claim, whether patented under the laws of the United States or held by location or possession, may have and acquire a right of way for ingress and egress, when necessary in working such mining claim, over and across the lands or mining claims of others, whether patented or otherwise.

“3224. When any mine or mining claim is so situated, that for a more convenient enjoyment of the same a road, railroad or tramway therefrom, or a ditch or canal to convey water thereto, or a ditch, flume, cut or tunnel to drain or convey the waters or tailings therefrom, or a tunnel or shaft, may be necessary for the better working thereof, which road, railroad, tramway, ditch, canal, flume, cut, shaft, or tunnel, may require the use or occupancy of lands or mining grounds, owned, occupied or possessed by others than the person or persons or body corporate, requiring an easement for any of the purposes described, the owner, claimant or occupant of the mine or mining claim first above mentioned, is entitled to a right of way, entry and possession for all the uses and privileges for such road, railroad, tramway, ditch, canal, flume, cut, shaft or tunnel, in, upon, through and across such other lands or mining claim, upon compliance with the provisions of this chapter.”

The succeeding sections of chap. 3, title 8, of the code prescribe the procedure for acquiring such property by condemnation.

The purposes having been specified in secs. 3223 and 3224, *supra*, for which property dedicated to mining may be appropriated, it follows that, unless it is being applied by its owner to, or in good faith held for, the same or a more neces-

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sary public use, which will be defeated or seriously interfered with thereby, it may be taken in aid of that industry under the power of eminent domain, for one or more of these designated purposes and none other.

In this case the trial court decreed "that it is necessary for the plaintiff to have the particular portions of said premises hereinafter described for the purpose of constructing, building and extending a tramway from the portal of the present Marsh adit tunnel to a point on the east side-line of the Never Sweat lode mining claim for the purpose of protecting said tramway and for the reasonable use thereof and of the works connected therewith, for tunnel facilities, for tracks and the extension of railroad tracks or in connection with railroad tracks across the same, for the construction of ore-bins, machine-shops, ore-sorting plant, sheds for timber, stull-yards, and land for other necessary mining uses and purposes in connection with the operation and development of the property of the plaintiff more fully set forth in the findings of fact." The decree then awards to respondent the right to have the land condemned for said purposes without designating any specific portion of it to be taken for any or either purpose. No allegation appears in the complaint that respondent requires any of appellant's land for tunnel facilities, nor does the record contain any evidence tending to support the portion of the decree relating to that use.

It is entirely clear that the law grants to respondent a right to condemn sufficient of appellant's land for an easement for a tramway and a railroad which, of course, contemplates the right to occupy sufficient ground to make the reasonable use thereof possible, and it is equally clear that there is no warrant of law for taking said property, or any part of it, for other purposes set out in the decree.

Since the portions of land necessary to be used for the purposes for which condemnation may be had have not been segregated and described separately from that which the trial court deemed necessary to be taken for purposes in behalf of which we have concluded the power of eminent domain cannot be invoked, it is impossible to modify the judg-

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ment, and it must therefore be reversed, and it is so ordered. Costs are awarded to appellant.

Budge, J., concurs.

SULLIVAN, C. J., Dissenting.—I am unable to concur in the conclusion reached by the majority of the court. I am of the opinion that under the law and the facts the decision of the trial court ought to be affirmed and not modified in any respect. The findings of fact made by the trial court are fully supported by the evidence.

The majority opinion proceeds upon the theory that a mining claim is already devoted to a public use, regardless of whether the owner is working or using it or not. The majority opinion states: "But it must be remembered that the tract here in controversy is now held by appellant for those purposes and the constitution makes no reference to the taking of property held for, or devoted to, a public use for the purpose of applying it to the same or any other use."

The record clearly shows, as the trial court found, that said land was not devoted to a public use. It was not being used by the owner for any purpose. The authorities cited by the appellant do not support the proposition that if property is held for a "*prospective*" public use, even in good faith, although not applied to such use, it cannot be taken under the right of eminent domain.

In *State ex rel. Harbor Boom Co. v. Superior Court*, 65 Wash. 129, 117 Pac. 755, the court there quotes from the decision of *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670, as follows: "There can be no doubt that property held by a corporation simply as a proprietor may be taken for a public use by another corporation having the right of eminent domain." Simply because the appellant company owned the land sought to be condemned as a mining claim and held it for a prospective public use, does not protect it from being condemned for a public use upon proper application.

Opinion of the Court—Per Curiam, on Rehearing.

Counsel for appellant do not contend that their client wants the property sought to be condemned at the present time, but that it may need it at some future time for the proper development of its mine. It is well settled that the mere possibility that land sought to be taken may at some future time become necessary in the operations of the appellant company does not exempt it from condemnation. (See 15 Cyc., p. 614, and authorities there cited.)

It was held in the condemnation case of the *Colorado Eastern R. Co. v. Union Pac. R. Co.*, 41 Fed. 293, that both on reason and authority a mere prospective use of the defendant should yield to the more immediate necessities of the petitioner in that case. (See 2 Lewis on Eminent Domain, 3d ed., p. 754.)

Property of a *quasi*-public corporation not in use and not necessary for the exercise of its public franchises or discharge of its public duties may be taken under the general power to condemn property the same as though it belonged to a private individual. (2 Lewis on Eminent Domain, 3d ed., p. 799.)

The property sought to be condemned in this action is not being used by the defendant for any purpose whatever, and the mere prospective use of the defendant corporation, should be compelled to yield to the more immediate necessities of the plaintiff in this case.

The judgment of the district court ought to be affirmed.

(June 30, 1917.)

ON REHEARING.

PER CURIAM.—A petition for rehearing was granted in this case, and it has been again fully submitted and considered.

The conclusion of the court is that it adheres to the former decision.

Points Decided.

(April 22, 1916.)

**THE NEW FIRST NATIONAL BANK OF COLUMBUS,
OHIO, a Corporation, Plaintiff, v. CITY OF WEISER
et al., Defendants.**

[166 Pac. 213.]

**MANDATE—CITIES AND VILLAGES—STATUTORY CONSTRUCTION—IMPROVE-
MENT BONDS—LIEN OF BONDHOLDERS—PAYMENT OF INTEREST AND
PRINCIPAL—LIABILITY OF LOT OWNERS.**

1. Under the provisions of sec. 2238 of the Political Code and amendments thereto, and the other sections of said Political Code defining the powers of cities and villages, improvement districts may be organized and improvement district bonds issued for the payment of improvements, and it is made the duty of the mayor and council to levy special assessments each year sufficient to redeem the instalments of such bonds maturing next after their issue, and the funds arising from such assessments shall be applied solely to the redemption of the principal and interest on said bonds, and such bonds are made liens upon the property of the abutting property owners, and if any of such property owners pay their assessments, they are entitled to be credited on their account, as shown by the assessment-roll, both for interest and principal, and the city authorities would have no authority under the provisions of said act to divert such money so paid by a property owner to the payment of the interest or principal due from another abutting property owner who failed or neglected to pay his assessments as required by law.

2. When a property owner pays his assessments as provided by said act and the city ordinance, the money arising therefrom must be paid by the city authorities on the interest due on such bonds and on the matured principal, and such property owner is entitled to have his property released from the lien of such bonds to the extent of the payment made, and the money so paid by the property owner cannot be diverted to the payment of the interest or principal due on said bonds from other property owners who fail to pay their assessments.

3. The benefit assessed to each lot or parcel of ground abutting on such improvement is liable for the payment of assessments made against such lot or parcel of ground, and if the city fails or refuses to pay such bonds, or promptly collect any such assess-

Points Decided.

ments when due, the owner of such bonds may proceed in his own name to collect such assessments and may foreclose any lien thereon in any court of competent jurisdiction, and is authorized to recover in addition to the amount of said bonds and interest, five per centum, together with costs of such suit, including a reasonable sum for attorney's fees.

4. Said statute gives the bondholder a plain, speedy and adequate remedy at law whereby he can proceed to collect from each property owner the amount due from him on such bonds.

5. Under the provisions of subsec. 12, a lien is created against the property of the abutting owner and the bond owner is authorized to receive, sue for and collect any assessments made against such property through any of the methods provided by law for the collection of assessments for local improvements.

6. Subsec. 4 provides among other things, that the holder of any such bonds shall look only to the fund provided by such assessment for the principal and interest of such bond and gives the bondholder a preference over any mortgage or lien against the land of such abutting owner.

7. It was not intended that the bondholder could require a property owner who had paid his assessments as levied under said law to pay assessments for other abutting owners who are delinquent in the payment of their assessments.

8. Said act also provides that the holder of any such bonds shall have no claim for the payment of the same against the city or village except for the collection of the special assessments made for the improvements for which said bonds are issued, and the bondholder's remedy in case of nonpayment is confined to the enforcement of such assessments. This provision of said law is especially made a part of each bond.

9. The bondholder has no claim against the city on account of the debt created by such bonds, and is given no right as against a land owner who has paid all of his assessments, and the city authorities have no power or right to divert any portion of the principal or interest paid by such taxpayer to the payment of interest and principal owed by a delinquent taxpayer.

10. The bondholder may proceed in the matter as provided by statute, and can either secure his money from the delinquent taxpayer or obtain title to the property owned by such delinquent, free and clear of all encumbrances.

11. The plaintiff in this case has a plain, speedy and adequate remedy at law for the collection of any principal or interest due from any property owner who has failed to pay any assessments

Argument for Plaintiff.

made by the city authorities, and that being true, the peremptory writ of mandate will not issue.

[As to whether a personal liability may be created for an assessment for local improvements, see note in 133 Am. St. 929.]

Original proceedings in this court to require the city authorities of the City of Weiser to pay the funds arising from assessments made in a certain improvement district in a certain way. Alternative writ issued and on a hearing such writ quashed and the peremptory writ denied.

C. F. Reddoch, for Plaintiff.

The legislature intended the issuance of negotiable securities, which would permit and allow public improvements. While it is true that the holder of bonds issued under sec. 2238, Rev. Codes, must look to the local improvement fund for the principal and interest represented by his bond, yet there is no doubt but that the legislature intended and contemplated the issuance of a security, which would be marketable and would permit and allow municipal improvements, and if the contention of the city of Weiser and its officials should be sustained, street improvements in the state of Idaho are at an end until the legislature makes some other bonding provision, as a purchaser could not be found for such bonds. (Abbott on Negotiable Securities, sec. 11; Abbott on Public Securities, secs. 101, 117.)

There can be no question but that the legislature intended the interest should be paid as it matured, because if it is only to be paid in partial instalments, no one would buy such a bond. (*Veatch v. City of Moscow*, 24 Ida. 461, 134 Pac. 551.)

The plaintiff has a legal right to compel the defendant city and its officials to perform this duty, and the only adequate remedy is by writ of mandate. (*Fremont v. Crippen*, 10 Cal. 211, 70 Am. Dec. 711; *Babcock v. Goodrich*, 47 Cal. 488; *California Pac. R. Co. v. Central Pac. R. Co.*, 47 Cal. 528; *Raisch v. Board of Education*, 81 Cal. 542, 22 Pac. 890; *State v. Murphy*, 19 Nev. 89, 6 Pac. 840; *Coos Bay R. etc. Co. v. Wieder*, 26 Or. 453, 38 Pac. 338; *Yearian v. Spiers*, 4 Utah,

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482, 11 Pac. 618; *State v. Kamman*, 151 Ind. 407, 51 N. E. 483.)

The only argument which can be made against the issuance of the writ is that plaintiff has an equitable remedy by foreclosing the lien represented by instalments of the assessments maturing each year, and the authorities are uniform that an equitable remedy is not a bar to a proceeding by *mandamus*. (*State v. Sneed*, 105 Tenn. 711, 58 S. W. 1070; Roberts, Extraordinary Legal Rem., pp. 23, 25, 107; Merrill on Mandamus, sec. 35.)

J. W. Galloway, City Attorney, and Frank Harris, for Defendants, cite no authorities.

SULLIVAN, C. J.—This is an original application to this court by the plaintiff for a writ of mandate against the city of Weiser and its officials, commanding said city and its officials to apply the moneys now available in Local Improvement Districts Nos. 6 and 7, as well as all moneys hereafter to be received in said local district funds, or either thereof, first in the payment of interest upon the bonds of said district, and second, after the payment of interest, apply such funds as are available in either of said districts to the redemption of said improvement bonds in their order, beginning with the lowest number.

Upon said application, an alternative writ of mandate was issued and on the return day thereof the defendants demurred to the petition and also interposed a motion to quash.

The facts were not disputed and the question arose over the law applicable to the facts and involves the proper construction of sec. 2238, Rev. Codes, as amended by chap. 81, Laws 1911, p. 266, and especially subds. 11, 12 and 14 of subd. 6 of said section, relating to the issuance, payment of interest upon, and the redemption of bonds issued under the provisions of said section.

It is contended by counsel for plaintiff that a careful analysis of the provisions of said sec. 2238, and especially those provisions relating to the issuance, payment of interest upon

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and redemption of such bonds, will disclose the fact that to a certain extent they are obscure and uncertain, and when the same are compared with other improvement bond statutes of the state, that the legislative intent is manifest to the effect that the money collected each year from the assessment of the property liable to taxation in such districts, in case there is not sufficient collected to pay both principal and interest due in that year, that the interest must first be paid and the balance applied on the principal of said bonds in the order in which they become due.

This contention of counsel for plaintiff we do not think is consistent with the provisions of said law. Among the many provisions contained in said sec. 2238, as amended, we find the following in paragraphs 11, 12 and 14 of subd. 6:

Subd. 11: "Whenever the Mayor, or Council, or Trustees of any City or Village shall . . . cause any street or avenue, or alley in such city or village to be sidewalked, graded, curbed, etc., . . . the cost and expense of which is chargeable to the abutting, adjoining, contiguous or approximate property, they may, in their discretion, provide for the payment of the costs and expenses thereof by instalments instead of levying the entire tax or special assessments for such costs at one time, and for such instalments, they may issue, in the name of such city or village, improvement bonds of the district, . . . payable in instalments of equal amounts each year, none of which bonds nor any of the instalments shall run longer than ten (10) years, nor bear interest exceeding seven (7) per cent per annum, number of years for said bonds to run and the rate of the interest thereon, within said limits, in each instance to be determined by the City Council or Village Trustees.

" . . . Such bonds shall not be issued in amount in excess of the contract price or cost of the work of improvement, except that the instalment coupons shall include the interest on such instalments to the maturity thereof. The bonds shall be of such denomination as the mayor or trustees shall deem proper.

“When district bonds are issued under this section the Mayor and Council shall levy special assessments each year sufficient to redeem the instalments of such bonds next thereafter maturing, but in computing the amount of special assessments to be levied against each piece of property liable therefor, interest thereon not exceeding seven (7) per cent per annum from the date of the issuance of said bonds until the maturity of the instalments of bonds next thereafter maturing Such bonds shall be numbered from one (1) upward, consecutively, Each bond shall provide that the principal sum therein named and the interest thereon shall be payable out of the local improvement fund created for the payment of the cost and expense of such improvement and not otherwise. The owner of any piece of property liable for any special assessments may redeem his property from such liability, after the issuance of the bonds, by paying all the instalments of the assessments which have been levied and also the amount of unlevied instalments with interest on the latter at the rate of seven (7) per cent per annum from the date of the issuance of the rate bonds to the time of maturity of the last instalment all sums so paid [whether before or after the issuance of the bonds] shall be applied solely to the payment of such improvements or the redemption of the bonds issued therefor.

“When any piece of property has been redeemed from liability for the costs of any improvements as herein provided, such property shall not thereafter be liable for further special assessments for the cost of such improvement except as herein-after provided.

“ The funds arising by such assessment shall be applied solely towards the redemption of the bonds.”

Subd. 12: “ And such bonds shall be equal liens upon the property for the assessments represented by such bonds without priority of one over another to the extent of the several assessments against the several lots and parcels of land. . . . ”

Subd. 14: “ Any city whose charter provides for the issuance of bonds for local improvements, payable only from

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the proceeds of special assessments, is hereby authorized to issue such bonds in the manner and with the effect provided in this section, and the holder of any such bond shall look only to the fund provided by such assessment for the principal or interest of such bond."

Under said act the city is presumed to have its assessment-roll made up as provided by subsection 5 of sec. 2238, and in fact it is conceded that the city has done so and charged each property owner with the cost of the improvement abutting his property. By the provisions of subsection 11, the council is required to levy each year special assessments sufficient to redeem the instalments of such bonds next thereafter maturing, but in computing the amount of special assessments to be levied against each piece of property liable therefor, interest thereon not exceeding seven per cent per annum from the date of the issuance of said bonds until the maturity of the instalments next thereafter maturing, and it is provided that such assessments shall be made upon the property chargeable for the costs of such improvements, respectively. And it is provided that if any of the property owners pay their special assessments, they are entitled to be credited on their accounts as shown by the roll, both for interest and principal, and the roll should show such payments. The amounts having been thus charged to each piece of abutting property and paid by each property owner for the purpose of paying off his liability under such assessments, both principal and interest, the city authorities would have no authority under said act to divert the money so paid by the property owner to the payment of interest or principal due from abutting property owners who failed or neglected to pay their assessments as required by law. We do not think the city treasurer, under said act, would have the authority to divert the funds thus collected to the payment of the interest due from a delinquent. When a property owner pays his assessment as provided by said act and the city ordinance, the money arising therefrom is apportioned to the improvement district fund and from that fund the money is paid over to the holders of the bond for the purpose of paying interest on unpaid instal-

ments, and the payment of the matured bonds themselves, as far as the money collected will go. Neither the statute nor the ordinance of the city authorizes any other method of distributing the funds than was used by the city treasurer.

The benefit assessed to each lot or parcel of ground abutting on such improvement is made liable for the payment of such assessment, and if the city shall fail, neglect or refuse to pay such bonds, or promptly collect any such assessments when due, the owner of any such bonds may proceed in his own name to collect such assessments and foreclose any lien thereon in any court of competent jurisdiction, and shall recover in addition to the amount of said bonds and interest thereon, five per centum, together with the costs of such suit, including a reasonable sum for attorneys' fees. (Sess. Laws 1911, p. 274.)

Thus the bondholder is given a plain, speedy and adequate remedy at law whereby he may proceed to collect from each property owner the amount due from him. This is certainly a plain, adequate remedy for the collection of any amount due from any delinquent or any lot subject to said assessment.

Under the provisions of subsec. 12, a lien is created against the property of the owner and the owner of the bond is authorized to receive, sue for and collect such assessments embraced in any such bond, or through any of the methods provided by law for the collection of assessments for local improvements.

Subsec. 4, among other things, provides that the holder of any such bonds shall look only to the fund provided by such assessment for the principal or interest of such bond. And it is also provided that "whenever any expense or cost of work shall have been assessed on any land, the amount of such expense shall take precedence over all other liens, and which may be foreclosed in accordance with the provisions of the Code of Civil Procedure." The bondholder is thus given a preference over any mortgagee or lienholder against the land of each property owner. It was not intended that the bondholder could require a property owner who has paid his assess-

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ment as levied to pay assessments for others who are delinquent or who have neglected to pay their assessments.

Said section also provides that the holder of any bond issued under the authority of said act shall have no claim therefor against the city or village by which the same is issued, in any event except for the collection of the special assessments made for the improvement for which said bond was issued, but this remedy, in case of nonpayment, shall be confined to the enforcement of such assessments; and it is provided that a copy of this subdivision of this section shall be plainly written or engraved upon the face of each bond issued under said act.

The bondholder can have no claim against the city on account of the debt created by the bond, and the bondholder is given no right as against a taxpayer who has paid all of his assessments. Such taxpayer has cleared himself from all liability on account of the bond issue, or in proportion to the time he has paid; that is to say, if he has paid up his assessments for three years, he has discharged that proportional part of his share of the bonded indebtedness, and the city authorities would have no right to divert any portion of the principal and interest paid by such taxpayer to the payment of the interest and principal on such bonds owed by a delinquent taxpayer.

It is not claimed in this proceeding that the city authorities have failed or neglected to make proper levies at the proper time, or that its officers have not in proper season certified to the tax collector the list of taxpayers against whom tax levies have been made on account of said bonded indebtedness and interest, and if all such assessments have not been paid, it is not the fault of the city but of the individuals who have let their taxes go delinquent. The city has no method of getting the money out of these delinquents except in the due and ordinary course of law. If the bondholder sees fit to proceed in the manner provided by statute, he can either secure his money from the delinquent taxpayer or obtain title to the property of such delinquent free and clear of all encumbrances.

Opinion of the Court—Per Curiam, on Rehearing.

The clear intent and meaning of said statute is to enable each property owner whose property is to be benefited by such public improvements to borrow sufficient money for that purpose on the strength and credit of his individual holdings to be so improved, and that no property owner stands as security for any other property owner.

The remedy of the bondholder in case a property owner fails to make payment of the taxes assessed against his property is not against the city nor the improvement district nor against a person who has paid the sum due from him, but against the property of the delinquent.

Under said act the plaintiff has a plain, speedy and adequate remedy at law for the collection of any interest or principal due from any property owner who has failed to pay the assessments made by the city authorities, and that being true, the writ of mandate will not issue. The bondholder must pursue the remedy provided by statute.

The alternative writ heretofore issued will be quashed and the peremptory writ denied, with costs in favor of the defendants.

Budge and Morgan, JJ., concur.

(June 30, 1917.)

ON REHEARING.

PER CURIAM.—In this case a rehearing was granted and the case has been argued and submitted upon rehearing.

Upon further consideration of the case on rehearing the court adheres to the conclusions reached upon the former hearing.

The judgment heretofore announced will remain as the judgment of this court.

Argument for Appellants.

(June 17, 1916.)

CHARLES G. HAYTON and MARY L. HAYTON, His Wife, Respondents, v. W. R. CLEMANS and MAUD CLEMANS, His Wife, Appellants.

[165 Pac. 994.]

RESCISSION OF CONTRACT—CANCELLATION DEED—PROMISSORY NOTE—
FRAUDULENT REPRESENTATIONS—COMPLAINT SUFFICIENT—CONFLICT
IN EVIDENCE—JUDGMENT SUSTAINED.

1. Where an action is brought to rescind a contract, to cancel and hold for naught a deed made and delivered, and to secure the recovery of a promissory note given at the time of, and in connection with, the making of the contract and deed, and for a reasonable rental of the premises possessed by defendant subsequent to the making and delivery of the deed, and the complaint alleges that the contract was entered into and the deed and promissory note made and delivered as the result of false and fraudulent representations of defendant known by him to be false and fraudulent when made, and to have been made with the intent to deceive the plaintiff and to have him act upon them, and that the plaintiff relied and acted upon such false and fraudulent representations and thereby suffered injury: *Held*, that the complaint states facts sufficient to constitute a cause of action.

2. Where there is a substantial conflict in the evidence, neither the findings nor judgment of the trial court will be disturbed on appeal.

[As to right of purchaser to rescind contract of sale for breach by vendor in tendering less land than quantity contracted for, see note, in *Ann. Cas.* 1916D, 1154.]

APPEAL from the District Court of the Second Judicial District, for Latah County. Hon. Edgar C. Steele, Judge.

Action for the rescission of a contract, the cancelation of a deed and promissory note, and for the recovery of rental. Judgment for plaintiff. *Affirmed*.

G. G. Pickett and A. L. Morgan, for Appellants.

The complaint must allege that prior to the commencement of the action the plaintiff had elected to rescind; that acting

Argument for Respondents.

upon such election, he had restored or offered to restore whatever he had received in the transaction, and that he still stands ready, willing and able to make such restoration, providing the thing to be restored is of any value. (*Godding v. Decker*, 3 Colo. App. 198, 32 Pac. 832; *Breshears v. Callender*, 23 Ida. 348, 131 Pac. 15; *Herman v. Haffenegger*, 54 Cal. 161.)

"If a party has no cause of action at the time of its commencement he cannot maintain it by filing a supplemental complaint founded upon matters which have subsequently occurred." (*Hill v. Den*, 121 Cal. 42, 53 Pac. 642.)

This action cannot be maintained upon an amended complaint setting out a condition of affairs which did not exist at the time of the commencement of the action. (*Wittenbrock v. Bellmer*, 57 Cal. 12; *Kelley v. Owens*, 120 Cal. 502, 47 Pac. 369, 52 Pac. 797; *Gifford v. Carvill*, 29 Cal. 589.)

Courts of other states also hold that a return or offer to return is a condition precedent to the commencement of an action upon the rescission of a contract. (*State v. Dennis*, 39 Kan. 509, 18 Pac. 723; *Bowden v. Achor*, 95 Ga. 243, 22 S. E. 254; *Dotterer v. Freeman*, 88 Ga. 479, 14 S. E. 863; *Bryant v. Stothart*, 46 La. Ann. 485, 15 So. 76; *Harkness v. Cleaves*, 113 Iowa, 140, 84 N. W. 1033; *Reeves v. Corning*, 51 Fed. 774.)

Frank L. Moore and J. H. Forney, for Respondents.

The complaint is sufficient. (*Breshears v. Callender*, 23 Ida. 348, 131 Pac. 15.)

Restitution of consideration is excused under the allegations of the amended complaint and the facts disclosed by the evidence. (*Pomeroy's Equitable Remedies*, sec. 688, notes 67, 70, 73, 74.)

Findings of fact by the court and judgment thereon, based on evidence substantially conflicting, will not be disturbed on appeal. (*Sabin v. Burke*, 4 Ida. 28, 37 Pac. 352; *Spaulding v. Coeur d'Alene Ry. etc. Co.*, 5 Ida. 528, 51 Pac. 408; *Pine v. Callahan*, 8 Ida. 684, 71 Pac. 473; *Curtis v. Kirkpatrick*, 9 Ida. 629, 75 Pac. 760; *Heckman v. Espey*, 12 Ida. 755, 88 Pac.

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80; *Miller v. Donovan*, 13 Ida. 735, 13 Ann. Cas. 259, 92 Pac. 991; *Hutchinson v. Watson Slough Ditch Co.*, 16 Ida. 484, 133 Am. St. 125, 101 Pac. 1059; *Salisbury v. Spofford*, 22 Ida. 393, 126 Pac. 400; *Miller v. Blunck*, 24 Ida. 234, 133 Pac. 383; *Hufton v. Hufton*, 25 Ida. 96, 136 Pac. 605; *Cameron Lumber Co. v. Stack-Gibbs L. Co.*, 26 Ida. 626, 144 Pac. 1114; *Bower v. Moorman*, 27 Ida. 162, 147 Pac. 496; *Pomeroy v. Gordan*, 25 Ida. 279, 137 Pac. 888; *Commercial Trust Co. v. Idaho Brick Co.*, 25 Ida. 755, 139 Pac. 1004.)

BUDGE, J.—This suit was brought by respondents in the district court of the second judicial district, in and for Latah county, against appellants, for the cancelation of a certain deed made by respondents by which certain lands and premises belonging to respondents situate in Latah county, Idaho, were conveyed to appellant W. R. Clemans, and for the cancelation of a certain promissory note for the sum of \$1,000 made by respondents and payable to the order of appellant W. R. Clemans.

From the record it appears that respondents were the owners of certain lands and premises situate in Latah county, and that appellants were the owners of an undivided fifty-eight per cent of an interest in a large tract of land lying in Walla Walla county, Washington. This interest was by virtue of a contract for a sale of said land by one Preston to one Kenworthy. On March 27, 1913, appellant W. R. Clemans proposed to sell to respondent Charles G. Hayton a twenty-five per cent, or one-fourth interest, in and to the lands and premises lying in Walla Walla county. It is charged in the complaint that appellant W. R. Clemans, for the purpose of inducing respondents to enter into this contract, made false and fraudulent representations in five different and distinct particulars: First, that there were 1,800 acres of growing crop upon said Walla Walla lands, when in truth and in fact there were not to exceed 800 acres of growing crop; second, that 320 acres of good land in sec. 8, twp. 12 north, range 36 E., W. M., was a part of the tract in which respondents were purchasing an interest, when in truth and in fact it was not

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a part, and was the land of another; third, that certain valueless land, consisting of 320 acres in sections 4 and 9 of said lands and premises, was not a part of the tract in which respondents were about to purchase from appellant a one-fourth interest; fourth, that for the year 1912 the lands and premises in Walla Walla county produced from thirty-nine to forty-two bushels of wheat to the acre, when in truth and in fact for that season the premises produced only eleven bushels per acre; fifth, that there was due from Walter Kenworthy to W. G. Preston, upon the contract, as the purchase price to be paid for these premises, the sum of \$33,000 and no more, when in truth and in fact there was due upon this contract the sum of approximately \$39,000.

The complaint also sets out that appellant W. R. Clemans made such false and fraudulent representations in each and all of these particulars, knowing the same to be false and untrue, for the purpose of inducing respondents to convey to him the said tract of land belonging to them, mentioned and described as being in Latah county, and for the purpose of inducing them to make, execute and deliver to him a certain promissory note for the sum of \$1,000; that respondents did not know and had no means of knowing that the fraudulent representations so made by appellant W. R. Clemans were false and fraudulent, and that, relying upon these representations and believing them to be true, they entered into a contract with said appellant for the purchase of his twenty-five per cent or one-fourth interest in and to the lands and premises mentioned and described as being in Walla Walla county, Washington; that as a consideration for this purchase, respondents by a good and sufficient deed conveyed to appellant W. R. Clemans the property mentioned and described as being in Latah county, Idaho, at an agreed price of \$9,300, and made and delivered to him their promissory note in the sum of \$1,000, and assumed and agreed to pay the unpaid balance due under the contract between W. G. Preston and wife and Walter J. Kenworthy, aggregating \$33,000 as represented by appellant W. R. Clemans, and further assumed the payment of one-fourth of \$20,000 secured by mortgage upon the lands

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and premises in Walla Walla county, Washington; that respondents did not discover such fraud until about the middle of April, 1913, and after they had made and delivered to the said W. R. Clemans the deed and note; that upon discovering that they had been defrauded, they demanded of W. R. Clemans that he reconvey the lands and premises located in Latah county to them and return and surrender to them the said promissory note, with which demand and request he failed and refused to comply.

It is further alleged that on or about June 30, 1913, W. G. Preston and his wife, Matilda Cox Preston, began an action in the circuit court of Washington, Walla Walla county, against respondent Andrew M. Anderson and wife, C. Quesnell and wife, and appellant W. R. Clemans and wife, to annul, vacate, set aside and rescind the contract between him, W. G. Preston, and Walter J. Kenworthy, for the sale to Kenworthy of the lands in Walla Walla county, and under which these respondents and appellants acquired and held an interest in said lands, which action was predicated upon a breach of this contract by default in the payment of moneys due November 1, 1912, according to the terms of the contract, which payments he, W. R. Clemans, had falsely and fraudulently represented to respondents had been made, and which default in said payment existed at the time the respondents made, executed and delivered to W. R. Clemans the deed and promissory note; that appellant Clemans failed and refused to perform the conditions of his contract, and permitted W. G. Preston and his wife to prosecute the action to judgment; and that these lands were not redeemed and the contract between W. G. Preston and Walter J. Kenworthy and all rights and interests thereunder by reason of the default were forfeited.

It is also alleged in respondent's complaint that the rental value of the lands so conveyed to W. R. Clemans was reasonably worth the sum of \$4,000 for the years 1913 and 1914, and that from March 27, 1913, and up to and until the filing of the amended complaint, the appellants have been in posses-

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sion of the lands and premises conveyed to them by respondents, and each and every part thereof.

The respondents prayed judgment in their complaint against appellants for a cancelation of the deed and the note mentioned and described in the complaint, and a reconveyance of their lands and premises to them, and a rescission of the contract to purchase said one-fourth interest in the Walla Walla county lands, for the sum of \$4,000, the rental value of the Latah county lands, and for all equitable relief.

Upon the trial of this cause, judgment was rendered in favor of respondents rescinding the contract, canceling and setting aside the deed made and delivered by respondents to appellant W. R. Clemans, and decreeing that W. R. Clemans return and deliver to Charles G. Hayton, the promissory note for the sum of \$1,000, and awarding judgment in favor of respondents and against appellant W. R. Clemans in the sum of \$300 as the rental of the lands conveyed by respondents mentioned and described in their complaint, located in Latah county, for the years 1913 and 1914.

This is an appeal from the judgment and from the order of the court overruling appellants' motion for a new trial. Appellants assign and rely for a reversal of the judgment and the action of the court in denying their motion for a new trial, upon five specifications of error; First, that the court erred in finding and deciding that the representations made by appellant constituted fraud or in any manner sustains judgment of cancelation of the deed from respondents to Clemans; second, that the court erred in overruling appellants' demurrer to the complaint; third, that the court erred in admitting any evidence over appellants' objection for the reason that the complaint does not state facts sufficient to constitute a cause of action; fourth, that the court erred in overruling appellants' motion for a new trial; fifth, insufficiency of the evidence to support the findings, conclusions and decree.

The foregoing assignments of error raise two material questions; First, does the complaint state facts sufficient to constitute a cause of action? And second, is the evidence

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sufficient to support the findings of fact made by the trial court, and the judgment entered thereon?

We have carefully examined respondents' complaint, and are of the opinion that it states a cause of action. (*Kemmerer v. Pollard*, 15 Ida. 34, 96 Pac. 206; *Breshears v. Callender*, 23 Ida. 348, 131 Pac. 15; *Brown v. Norman*, 65 Miss. 369, 7 Am. St. 663, 4 So. 293; *Pomeroy's Equity Jur.*, sec. 688, notes 67, 70, 73, 74.)

As to the second contention, the trial court found from all of the testimony of the witnesses that appellant W. R. Clemans, at the time he procured the respondents to enter into the contract referred to in the complaint, to make and deliver the deed to the premises upon which they resided in Latah county, and to execute and deliver the note for \$1,000, made false and fraudulent representations to the respondents, which he knew to be false and fraudulent at the time he made them, and which he made with the intention that respondents would act upon them, and that the respondents relied and acted upon such false and fraudulent representations to their injury. That these findings of facts are based upon substantially conflicting evidence is clearly apparent to us from an examination of the record. This being true, under the well-established holding of this court, neither the findings of fact nor the judgment based thereon will be disturbed on appeal. (*Heckman v. Espey*, 12 Ida. 755, 88 Pac. 80; *Huften v. Huften*, 25 Ida. 96, 136 Pac. 605; *Henry Gold Min. Co. v. Henry*, 25 Ida. 333, 137 Pac. 523; *Commercial Trust Co. v. Idaho Brick Co.*, 25 Ida. 755, 139 Pac. 1004.)

We are therefore forced to the conclusion that the judgment of the trial court should be sustained, and it is so ordered. Costs are awarded to respondents.

Sullivan, C. J., concurs.

Justice Morgan did not sit at the hearing of this case and took no part in the decision.

Opinion of the Court—Flynn, District Judge, on Rehearing.

(June 28, 1917.)

ON REHEARING.

RESCISSION OF CONTRACT—PLEADING.

1. In an action for the rescission of a contract, the complaint need not show that prior to the commencement of the action plaintiff offered to place defendant *in statu quo*.

2. Where the complaint in an action for the rescission of a contract shows that the consideration received by plaintiff was an interest in land under a contract of purchase, and that such contract has been foreclosed by decree for default in payments due thereunder, which payments defendant represented to plaintiff had already been made, it is not necessary that the complaint should offer to restore to defendant the consideration received as a condition precedent to plaintiff's right to cancelation and rescission.

FLYNN, District Judge.—A rehearing having been granted in this case, the court has very carefully reconsidered the questions presented to it upon this appeal. The point most strenuously urged is that the complaint fails to state facts sufficient to constitute a cause of action in that it does not show that at the time plaintiff claims to have discovered that he was defrauded, and at the time the action was commenced, any offer was made to return to defendant the interest or title to the Walla Walla property. The allegations of the complaint as to the transactions between the parties are sufficiently shown in the original opinion. It is further urged that not only is the complaint insufficient in this respect, but that the proof shows that no such offer was made, and that therefore the entire case must fail.

The contention of appellant on this point, as I understand it, is that before a party is entitled to rescind a contract, he must put, or offer to put, the other party *in statu quo* by a full restoration of all that he has received. This court has heretofore held that this rule is applicable in cases where a rescission is made before an action is brought, but that such a tender or offer is not necessary as a condition precedent to a suit for rescission, and I feel that such decision is control-

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ling and correct. (*Gamblin v. Dickson*, 18 Ida. 734, 112 Pac. 213.)

After the filing of the original complaint in this action, the rights of all the parties hereto in the Walla Walla property were canceled by a decree of the superior court of Washington for Walla Walla county, forfeiting the rights of all parties claiming under the Preston-Kenworthy contract for default in payment of moneys due November 1, 1912, under the terms of the contract. The amended complaint, on which this action was tried, pleads the decree of the Washington court.

Conceding that it is necessary in a suit for rescission that the plaintiff plead his willingness to restore the consideration received by him and to do equity, do the facts pleaded in relation to the foreclosure of the Washington contract, under which contract both appellants and respondents acquired an interest in the Walla Walla property, obviate the necessity of an offer in the amended complaint to restore the consideration received? I think they do. One of the very purposes of pleading the Washington decree must have been to show that the consideration received by Hayton had gone from his control and could not be returned on account of the decree foreclosing for a default in a payment past due at the time Hayton and Clemans made their contract, which payment Clemans fraudulently and falsely represented had been made. At the time of the filing of the amended or supplemental complaint in this action, Hayton had no interest in the Walla Walla property. His rights had been foreclosed by the Washington decree. He had nothing to tender back to Clemans and was in this condition through no default of his own. Under these circumstances it would be a futile offer on his part to assign back to Clemans his foreclosed equity in the Walla Walla land.

I agree also with the original opinion, filed in this case, that the findings of fact are based on substantially conflicting evidence, and therefore should not be disturbed.

The former opinion of the court in this case is reaffirmed.

Budge, C. J., and Rice, J., concur.

Argument for Appellants.

(June 30, 1916.)

**JULIA M. RATHBUN and ERASTUS A. RATHBUN, Her
Husband, Appellants, v. NEW YORK LIFE INSUR-
ANCE COMPANY, Respondent.**

[165 Pac. 997.]

LIFE INSURANCE—CONSTRUCTION OF CONTRACT BETWEEN PARTIES.

1. Where R., desiring life insurance, applied in writing to the insurance company for such insurance, and agreed that the policy of insurance applied for should not take effect unless the first premium was paid and the policy was delivered to and received by him during his lifetime and while he was in good health, and after applying for the policy and before the delivery thereof R. was stricken with appendicitis, from which he died five days after he received the policy, said policy having been sent to him by mail from the insurance company's branch office in Spokane, Washington, in total ignorance of the changed condition of R.'s health, and R.'s friends thereafter paid the first premium, which the company promptly returned when it discovered the fact of R.'s fatal illness, *held*, that the policy did not take effect by reason of the fact that R. was not in good health at the time it was received by him.

[As to what is good health within the meaning of the law of life insurance, see note in 10 Am. St. 242.]

APPEAL from the District Court of the Second Judicial District, for Latah County. Hon. Edgar C. Steele, Judge.

Action to recover on a life insurance policy. Judgment for defendant. *Affirmed.*

A. L. Morgan, for Appellants.

“Any agreement, declaration, or cause of action on the part of an insurance company which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture, though it might be claimed under the expressed letter

Argument for Respondent.

of the contract." (*New York Life Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. ed. 841.)

There is nothing in the contract, either in the application or in the policy itself, which required anyone to notify the New York Life Insurance Company of Rathbun's physical condition at the time such policy was ready for delivery. It was the company's right to refuse to deliver. It therefore became its duty to ascertain Rathbun's condition before exercising its option. (*Grier v. Mutual Life Ins. Co. of New York*, 132 N. C. 542, 44 S. E. 28.)

It is a thoroughly settled rule in the construction of a policy of insurance, which is reasonably susceptible of two interpretations, that that meaning will be given to it which is more favorable to the insured. (*Moore v. Aetna Life Ins. Co.*, 75 Or. 47, Ann. Cas. 1917B, 1005, 146 Pac. 151, L. R. A. 1915D, 264; *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405, 413, 88 Am. Dec. 337; *Darrow v. Family Fund Society*, 116 N. Y. 537, 15 Am. St. 430, 22 N. E. 1093, 6 L. R. A. 495; *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552; 42 L. ed. 977; *Sneck v. Travelers' Ins. Co.*, 88 Hun, 94, 34 N. Y. Supp. 545; *Union Accident Co. v. Willis*, 44 Okl. 578, 145 Pac. 812, L. R. A. 1915D, 358.)

An insurance company cannot take an applicant's money by way of premium without giving in return insurance for all of the period covered by that premium. (*Anderson v. Mutual Life Ins. Co.*, 164 Cal. 712, Ann. Cas. 1914B, 903, 130 Pac. 726; *Gordon v. United States Casualty Co.* (Tenn. Ch.), 54 S. W. 98; *Unterharnscheidt v. Missouri State Life Ins. Co.*, 160 Iowa, 223, 138 N. W. 459, 45 L. R. A., N. S., 743.)

Clency St. Clair, J. H. Forney and Frank L. Moore, for Respondent.

The negotiations between parties making a life insurance contract are the same in the eye of the law as are the negotiations between parties making a contract for any other purpose. (*Stephens v. Capital Ins. Co.*, 87 Iowa, 283, 54 N. W. 139; *Weidenaar v. New York Life Ins. Co.*, 36 Mont. 592, 122

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Am. St. 330, 94 Pac. 1; *Quinlan v. Providence-Wash. Ins. Co.*, 133 N. Y. 356, 28 Am. St. 645, 31 N. E. 31; *Conway v. Phoenix Mut. Life Ins. Co.*, 140 N. Y. 79, 35 N. E. 420; *Dwight v. Germania Life Ins. Co.*, 103 N. Y. 341, 57 Am. Rep. 729, 8 N. E. 654; *Liverpool & L. & G. Ins. Co. v. Kearney*, 180 U. S. 134, 21 Sup. Ct. 326, 45 L. ed. 460; *Wells Fargo & Co. v. Pacific Ins. Co.*, 44 Cal. 397.)

The merits of the case, therefore, must be determined according to the established rules of the law of contracts. (*Iowa Life Ins. Co. v. Lewis*, 187 U. S. 335, 23 Sup. Ct. 126, 47 L. ed. 204; *Behling v. Northwestern Nat. Life Ins. Co.*, 117 Wis. 24, 93 N. W. 800.)

No insurance took effect because the first premium was not paid nor the policy delivered to and received by the applicant during his lifetime and good health. (*Nyman v. Manufacturers' & M. Life Assn.*, 262 Ill. 300, 104 N. E. 653; *Gallop v. Royal Neighbors of America*, 167 Mo. App. 85, 150 S. W. 1118; *Reese v. Fidelity Mut. Life Assn.*, 111 Ga. 482, 36 S. E. 637; *Metropolitan Life Ins. Co. v. Willis*, 37 Ind. App. 48, 76 N. E. 560.)

SULLIVAN, C. J.—This is an action brought by the mother and father to recover on a life insurance policy issued to their son, Ernest C. Rathbun. A demurrer to the complaint was overruled and answer filed by the Insurance Company denying its liability. Thereupon the issues were tried to the court without a jury and judgment was entered against the plaintiffs, from which this appeal was taken.

The action of the court in overruling plaintiffs' demurrer to the defendant's answer and in overruling plaintiffs' objection to the introduction of any testimony under the allegations of the answer, and in making findings of fact and conclusions of law and entering judgment in favor of the defendant, is assigned as error.

The following facts appear from the record:

On the 9th day of April, 1913, Ernest C. Rathbun, son of the plaintiffs, made application to the defendant, New York Life Insurance Company, for a \$2,000 insurance policy upon

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his life, in which policy the plaintiff Julia M. Rathbun was made the beneficiary. Thereafter on April 17, 1913, the Insurance Company issued the policy and the policy recites that the insurance is granted in consideration of the payment of the first premium amounting to \$41.68, and the policy contains an acknowledgment of the receipt of such payment. The policy also contains the following, among other, recitations: "After its delivery to and receipt by the insured, the policy takes effect as of the 9th day of April, 1913, that being the date upon which the application for such policy was made."

It is alleged in the complaint that subsequent to the execution of said contract and prior to the 10th day of May, 1913, the policy was delivered to said insured and that during the month of June, 1913, the beneficiary made due proof of the death of Ernest C. Rathbun in accordance with the terms of said policy, and demanded from said insurance company the payment of the sum of \$2,000 as provided in such policy, which payment said company refused, one of the grounds for such refusal being, as appears from the answer, that said policy was issued by the company upon application and that the applicant paid at the date of application \$5 in cash and executed and delivered to the agent who took said application his promissory note for the balance of the amount due for the first premium, and that the policy was forwarded by registered mail addressed to the insured from the company's branch office in Spokane, Washington, and the same was receipted for by one C. L. Williamson, and on the 5th day of May was by said Williamson delivered to Ernest C. Rathbun. On the 28th day of April, 1913, the applicant became ill with appendicitis and died on the 10th day of May, 1913. It is further alleged that the application for said policy contains, among other things, the following stipulation or agreement:

"That the insurance hereby applied for shall not take effect unless the first premium is paid and the policy is delivered to and received by me during my lifetime and good health, and that unless otherwise agreed in writing, the policy shall

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then relate back to and take effect as of the date of this application.

“That any payment made by me before delivery of the policy to, and its receipt by, me as aforesaid shall be binding on the Company only in accordance with the terms of the Company’s receipt therefor on the receipt form which is attached to this application and contains the terms of the agreement under which said payment has been made and is the only receipt the agent is authorized to give for such payment.”

As stated above, on the trial of the case judgment was entered in favor of the respondent insurance company.

In its answer and on the trial of the case, the main contentions of the insurance company were, first, that under the terms of the contract the first premium was to be paid in cash; and, second, the policy was not to take effect unless the insured was in good health at the time it was delivered to him. Said contentions are partly based upon the stipulations above quoted from the application for said insurance.

The court in its findings of fact among other things found as follows:

“The court further finds that Ernest C. Rathbun, the plaintiffs’ son, applied in writing for insurance on his life, agreeing therein that the insurance thereby applied for should not take effect unless the first premium was paid and the policy was delivered to and received by him during his lifetime and good health. After applying for the policy and before its delivery, the applicant was taken with appendicitis, from which he died. While he was in the hospital, the soliciting agent at Spokane, in total ignorance of the changed condition of the applicant’s health, mailed him the policy. The applicant’s friends thereafter paid the first premium, which the company promptly returned when it discovered the facts.”

The evidence is clearly sufficient to sustain this finding of fact.

Then if the parties understood and agreed that the policy should not become effective unless the first premium was paid and the policy was delivered to and received by the ap-

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plicant during his lifetime and while he was in good health, and both of those conditions failed, the contract of insurance was never completed and the policy was of no force and effect. It is a well-recognized rule that life insurance results from contract and that the true rule is that no other or different rule is to be applied to a contract of insurance than is applied to other contracts. (*Quinlan v. Providence-Washington Ins. Co.*, 133 N. Y. 356, 28 Am. St. 645, 31 N. E. 31.) In life insurance contracts, the assent of both parties is required as in any other contract. (*Stephens v. Capital Ins. Co.*, 87 Iowa, 283, 54 N. W. 136; *Weidenaar v. New York Life Ins. Co.*, 36 Mont. 592, 122 Am. St. 330, 94 Pac. 1.)

In the determination of this case, the application and the policy itself must be examined and considered in order to ascertain the true situation of the parties under the negotiations and agreements between them. (*Iowa Life Ins. Co. v. Lewis*, 187 U. S. 335, 23 Sup. Ct. 126, 47 L. ed. 204; *Behling v. Northwestern Nat. Life Ins. Co.*, 117 Wis. 24, 93 N. W. 800.)

If we concede in this case that the first premium was paid by the payment of the five dollars and the delivery of the insured's promissory note to the agent of the company for the balance, the plaintiffs would not be entitled to recover, for the reason that the policy was not delivered to and received by the applicant while he was in good health but when he was fatally ill. He became ill with appendicitis on the 28th of April, 1913, was operated on that day and thereafter died on the 10th day of May, 1913, five days after receiving the policy.

Upon a proper construction of the contract between the applicant and the insurance company and on the evidence introduced on the trial, the plaintiffs are not entitled to recover. The judgment must therefore be affirmed, and it is so ordered, with costs in favor of respondent.

Budge, J., concurs.

Morgan, J., did not sit at the hearing and did not take any part in the decision of this case.

Opinion of the Court—Flynn, District Judge on Rehearing.

(June 26, 1917.)

ON REHEARING.

FLYNN, District Judge.—A rehearing having been granted, this case was submitted on briefs.

We concur in the conclusion reached by the court in its original opinion, that the policy in question never took effect, because it was not delivered to and received by the applicant while he was in good health. The policy provides that "the policy and the application therefor constitutes the entire contract between the parties"; and under the terms of the application, it was made a condition precedent to the policy's taking effect that the insured should be in good health when the policy was delivered and received. (14 R. C. L. 900, sec. 78.)

We are not in accord, however, with the intimation that the first premium was not paid, though we are probably precluded from holding otherwise, because of the fact that the trial court found that the giving and acceptance of a note for the balance of the first year's premium, after paying five dollars cash thereon, was a personal matter between the applicant for insurance and the agent, and that defendant had no rights thereunder or interest therein. The evidence not being before this court, it will be presumed that it supports this finding. (*McCornick v. Brown*, 22 Ida. 52, 125 Pac. 197.)

The former judgment of this court is therefore reaffirmed.

Budge, C. J., and Rice, J., concur.

Points Decided.

(December 17, 1916.)

STATE and ROBERT RAYL, Plaintiffs, v. TWIN FALLS-SALMON RIVER LAND AND WATER COMPANY, a Corporation, and SALMON RIVER CANAL CO., LTD., Defendants, and A. E. CALDWELL et al., Interveners.

[166 Pac. 220.]

CAREY ACT LANDS—RECLAMATION OF—WATER APPROPRIATION FOR—INSUFFICIENCY OF—SCHOOL LANDS WITHIN CAREY ACT PROJECT—PURCHASER OF—RIGHT TO WATER FOR—RIGHT OF STATE—STATUTORY CONSTRUCTION—CONTRACTS—CONSTRUCTION OF—CAREY ACT—CONSTRUCTION OF—SUFFICIENCY OF WATER SUPPLY FOR CAREY ACT LANDS—WHEN AND BY WHOM DETERMINED—CONSTRUCTION CONTRACT—AMENDMENTS TO—ESTOPPEL—APPLICATION TO STATE.

1. Under the act of Congress known as the Carey Act and the amendments thereto (28 U. S. Stats. 372-422), and the statutes of this state applicable thereto, the state made application to the Secretary of the Interior for the segregation of about 150,000 acres of land within what is known as the Twin Falls-Salmon River, Carey Act project, which application was approved on the 10th day of April, 1908, and a contract was entered into between the United States government and the state on that date. The Twin Falls-Salmon River Land and Water Company was a corporation organized for the construction of a reservoir and canal system for the irrigation of said lands, and the state entered into a contract with said corporation on April 30, 1908, for the construction of the proposed irrigation works, whereby said construction company agreed to construct said works in accordance with certain plans and specifications; and it is provided, among other things in said contract, that shares of water rights should be sold to persons purchasing any portions of any state school lands within said project which were susceptible to irrigation and reclamation from said system, at a price not to exceed thirty dollars per share, provided that said water rights were purchased within one year after the purchase of the lands from the state, and not exceeding forty dollars per share at any time thereafter. The construction company proceeded and constructed said works under the supervision of the state authorities. During the period of construction it was ascertained that the available supply of water for said project was less than one-half what it had theretofore been determined

Points Decided.

by the land Department of the government and the state authorities, and was agreed between the state and the construction company that not more than 80,000 acres of said Carey Act lands should be put on the market for sale and settlement. About 73,000 acres of said land were sold by the state to prospective settlers, about 14,000 acres of which thereafter became forfeited because the purchasers failed to comply with the law, thus leaving about 59,000 acres; and on later investigations of the available water supply for the lands within said project, it was ascertained that there was not sufficient water to reclaim the Carey Act lands which had already been sold. Thereafter on June 11, 1915, the state sold 160 acres of its school lands within said project to the plaintiff Rayl, and thereupon Rayl demanded of the construction company and also of the canal company that they sell to him a water right for said land, which they refused to do. *Held*, under the facts that the peremptory writ of mandate will not issue to compel said corporation to sell to him the water right demanded.

2. The construction company was permitted, under the law, to appropriate the water for said land for the purpose of transferring it to the settlers within said project for their use and benefit in connection with the irrigation system, it being intended that the settlers should ultimately own the entire project; the irrigation works and the water rights. The Construction Company was only a trustee in the appropriation of the water.

3. Under the provisions of sec. 1618, Rev. Codes, the state engineer is required to determine and report whether there is sufficient unappropriated water in the source of supply and whether or not a permit to divert and appropriate water through the proposed works has been approved by him, and whether the capacity of such works is adequate to reclaim the land described.

4. Sec. 1619, Rev. Codes, provides that no request for the segregation of lands on which the state engineer has reported adversely as to the water supply, feasibility of the construction, the cost or capacity of the works, or as to the character of the lands sought to be irrigated, shall be approved by the board.

5. *Held*, that the entire plan is one of complete state supervision and control.

6. In carrying out the provisions of the Carey Act and the statutes of this state applicable thereto, there are three contracts required: One between the government and the state, known as the state contract; one between the state and the construction company, known as the construction company contract; and one between the construction company and the settlers, known as the settlers' contract.

Points Decided.

7. The state acts in said matter as the agent or trustee for the settlers.

8. The general plan is that the cost of reclamation of such lands shall be assessed as a benefit against the land, to be paid by the settler, and that such benefit is assessed through the medium of the state board of land commissioners.

9. Under the provision of the Carey Act and the state law applicable thereto, the proper officers, both of the government and state, must determine in advance the sufficiency of the water supply, the character and kind of the system of irrigation that must be constructed, and the price to be charged the settlers for an interest therein. These things must all be done before the execution of the contract between the state and the construction company.

10. Where certain officers of the government and the state are authorized by law to pass upon matters of the character involved in this case, their decision is conclusive where no question of fraud is raised.

11. The time to ascertain whether the lands are of a character subject to segregation under the Carey Act and whether there is water available for their reclamation is prior to segregation.

12. The question of the sufficiency of the water supply for the irrigation of a certain tract of land must of necessity be a matter of approximate estimate.

13. Under the provisions of sec. 3289, Rev. Codes, any water company or corporation is forbidden to contract or sell more water than it is entitled to, and must not sell more water than it has.

14. By the terms of the state contract, the Construction Company agreed to sell shares of water stock "to the extent of the water rights to which it is entitled . . . but in no case shall water rights or shares be dedicated to any land before mentioned or sold beyond the carrying capacity of the canal or in excess of the appropriation thereof."

15. Held, that the cases of *State v. Twin Falls Canal Co.*, 21 Ida. 410, 121 Pac. 1039, and *State v. Twin Falls Canal Co.*, 27 Ida. 728, 151 Pac. 1013, have no application to cases where the water supply is not adequate or sufficient and are not applicable to the facts of this case.

16. Under the provisions of sec. 3, art. 15, of the state constitution, the right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied, and priority of appropriation shall give the better right as between those using the water.

17. The state in dealing with a Carey Act project is not dealing in its governmental capacity, but in its proprietary capacity—in its capacity as a private owner improving his own property.

Argument for Plaintiffs.

18. The doctrine of equitable estoppel does not apply to the government when it is dealing or operating in its governmental capacity, but when it is operating in its proprietary capacity substantial considerations underlying the doctrine of equitable estoppel apply to the government as well as to individuals.

19. Under the facts of this case, *held*, that an estoppel arises against the state, as no good reason can be offered why the state in its dealings in this matter should not be affected by considerations of morality and right which ordinarily bind the conscience, since the action of a sovereign state ought to be characterized by a more scrupulous regard to justice and higher morality than belongs to the ordinary transactions of individuals, and it clearly appears from the facts of this case that the state should act with fidelity and integrity toward the settlers.

20. Since the state and Rayl knew that the water supply was insufficient at the time said state land was sold and purchased, an equitable estoppel arises against them, and *held*, under the facts and the law, that the state is not entitled to a priority of right for any of said water for the land sold to Rayl.

[As to estoppel of state to take inconsistent positions, see note in *Ann. Cas.* 1914A, 229.]

Original application for a Writ of Mandate against the defendants requiring them to issue shares of water stock to the Plaintiff Robert Rayl, such water to be used in the irrigation of state school lands purchased by said Rayl within a Carey Act project. The alternative writ heretofore issued quashed and the peremptory writ denied.

J. H. Peterson, Atty. Genl., Herbert Wing and D. A. Dunning, Assts., T. A. Walters, Atty. Genl., and A. C. Hindman, Asst., for Plaintiffs.

The land owners have here agreed for a proportionate interest, and certainly those who purchased subsequent to the state contract cannot be heard to say that the state land is not entitled to any water. The correct rule to be applied in this case is that the water user is only entitled to a proportionate amount of water and that the grant will not be forfeited if a sufficient quantity of water is furnished to raise a reasonably profitable crop by the best methods of husbandry,

Argument for Defendants.

and such crop, if necessity demands, may be limited to crops requiring the minimum amount of water.

"It is the policy of the laws of this state, and it has been so declared from time to time by this court, to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and other useful and beneficial purposes." (*Farmers' Co-operative Ditch Co. v. River-side Irr. Dist.*, 16 Ida. 525, 535, 102 Pac. 481.)

Under the contracts in these cases, the settlers should be required to comply with the rules therein laid down, and, if necessary, limit their crops to those requiring the minimum amount of water.

"By the terms of the contract between the state and the Land & Water Company, the water appropriated was dedicated to the lands segregated and to the school lands within the segregation." (*State v. Twin Falls Canal Co.*, 21 Ida. 410, 121 Pac. 1039.)

Richards & Haga, for Defendants.

The doctrine of *State v. Twin Falls Canal Co.*, 27 Ida. 728, 151 Pac. 1013, and *State v. Twin Falls Canal Co.*, 21 Ida. 410, 121 Pac. 1039, that the purchaser of water rights acquired only a proportionate interest in the system, and that the contract with the state was merely a construction contract, and that the company was not the seller of specific quantities of water or a guarantor of the water supply, has been approved in the following cases, among others, decided by this court; *Bennett v. Twin Falls North Side Land & W. Co.*, 27 Ida. 643, 150 Pac. 336; *Idaho Irr. Co. v. Lincoln County*, 28 Ida. 98, 152 Pac. 1058; *Idaho Irr. Co. v. Pew*, 26 Ida. 272, 141 Pac. 1099.

The state contract, which the state is now seeking to enforce, was entered into under a mistake as to the amount of water available for the lands to be reclaimed thereunder. The enforcement of the contract as made would work a great hardship upon the settlers for whom the state was acting, as well as upon the company, and it would be unfair for the state to now insist upon the enforcement of the provisions of the con-

Argument for Intervenor.

tract, which rested originally upon its own erroneous estimate of the water supply. "Subsequent events which the parties cannot reasonably be supposed to have had in mind when the contract was made, and which work a hardship to defendant, have frequently furnished a sufficient reason for refusing specific performance." (36 Cyc. 617, 619; *Willard v. Taylor*, 8 Wall. (75 U. S.) 557, 19 L. ed. 501.)

Longley & Walters, for Intervenor.

The right sought to be enforced by a writ of mandate must be clear and well defined, and if its existence is doubtful, the writ will be denied. (*Clough v. Curtis*, 2 Ida. 523, 22 Pac. 8; *Peck v. Booth*, 42 Conn. 271; *People v. Crotty*, 93 Ill. 180; *State v. Omaha*, 14 Neb. 265, 45 Am. Rep. 108, 15 N. W. 210; *People v. New York Infant Asylum*, 122 N. Y. 190, 25 N. E. 241, 10 L. R. A. 381.)

The issuance of such writ would be contrary to the express terms and conditions of our statute. (Sec. 4977.)

If the Twin Falls Canal Co. case means what the state and the defendants claim, we are forced to the conclusion that the state of Idaho and the Construction Company have agreed that the water available, whatever it may be, shall be sufficient for the irrigation of all of the lands included in the segregation, and that it can make no difference whether the available supply will give the amount of two and three-fourths acre-feet, which amount "has been determined to be sufficient," or whether there is but one-half inch of water for one day in the year.

The contract in question has been construed by the United States court in the case of *Caldwell v. Twin Falls Salmon Land & Water Co.*, 225 Fed. 584.

The right given by the permit is merely a contingent right, which may ripen into a complete appropriation or may be defeated by the failure of the holder to comply with the requirements of the statute. The permit, therefore, is not an appropriation of the public waters of the state. (*Speer v. Stephenson*, 16 Ida. 707, 102 Pac. 365; *Nielson v. Parker*, 19

Argument by *Amicus Curiae*.

Ida. 727, 115 Pac. 488; *Youngs v. Regan*, 20 Ida. 275, 118 Pac. 499; *Marshall v. Niagara Springs O. Co.*, 22 Ida. 144, 125 Pac. 208; *Washington State Sugar Co. v. Goodrich*, 27 Ida. 26, 147 Pac. 1073; *Highland Ditch Co. v. Union Reservoir Co.*, 53 Colo. 483, 127 Pac. 1025; *Morris v. Bean*, 146 Fed. 423.)

S. H. Hays, *Amicus Curiae*.

A Carey Act company is not engaged in the sale or rental of water. The contract which the company makes with the state relates to construction matters only. (Secs. 1621, 1622, Rev. Codes; *Sauve v. Title Guaranty & Surety Co.*, 29 Ida. 146, 158 Pac. 112.)

From the beginning it was understood that the companies building the works stood in the position of construction companies only. (Mead's Irrigation Institutions, p. 272; *State v. Twin Falls Canal Co.*, 21 Ida. 410, 424, 121 Pac. 1039.)

The water under the statute and the contract in this case is appurtenant to the land and dedicated to it, and in this case has not been detached from it. (*Paddock v. Clark*, 22 Ida. 498, 126 Pac. 1053.)

This rule of proportionate interest has been settled in this court. (*State v. Twin Falls Canal Co.*, *supra*.)

The local land officers are given no power under the Carey Act to pass upon the plans. These plans are at once submitted to the officer who is the final arbiter of the department. His action is final. He cannot give an approval with a reservation, mental or otherwise, to the effect that he will not patent the lands unless the water supply should thereafter turn out to be as abundant as it had been in the past, or as satisfactory as he supposed it to be. The plans are presented to him for action and his action is final upon everything except the matter of the construction of the works, that being the only matter that, as stated, can be affected by human agency. (*Burke v. Southern Pacific R. Co.*, 234 U. S. 669, 34 Sup. Ct. 907, 58 L. ed. 1527 (1952); *Cowell v. Lammers*, 21 Fed. 200; *Davis v. Weibold*, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. ed. 238; *Barden v. Northern Pacific R. Co.*, 154 U. S. 288, 14 Sup.

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Ct. 1030, 38 L. ed. 922; *Shaw v. Kellogg*, 170 U. S. 312, 18 Sup. Ct. 632, 42 L. ed. 1050.)

If a matter in which the government is involved is given over to an officer for his determination, his decision is final. (Wyman's Administrative Law, sec. 116, p. 333; *United States v. California & Oregon Land Co.*, 149 U. S. 31, 13 Sup. Ct. 458, 37 L. ed. 354.)

W. G. Bissell, *Amicus Curiae*.

Water is, in our state, a commodity, its appropriation for the purpose of rental and sale being expressly recognized by the constitution; and when once appropriated is subject to disposal by contract and to barter and sale as other real estate (*Hall v. Blackman*, 8 Ida. 272, 68 Pac. 19; *McGinness v. Stanfield*, 6 Ida. 372, 55 Pac. 1020; *Village of Hailey v. Riley*, 14 Ida. 481, 95 Pac. 686, 17 L. R. A., N. S., 86; *Gard v. Thompson*, 21 Ida. 485, 123 Pac. 497), and is something that has a recognized legal measurement (sec. 3241, Rev. Codes), whereby it may be measured and described when sold and rented.

The contract here expressly provides that the extent of the water right sold is two and three-fourths acre-feet of water, and is a legal and binding contract.

Sec. 3289, Rev. Codes, provides: That any company owning or controlling any irrigation works for the distribution of water under the sale or rental thereof shall furnish water to all persons, owning or controlling land susceptible to irrigation therefrom. But *such company* is positively forbidden to contract to deliver more water than it owns.

In this case the plaintiff, under the admitted facts, is asking this court to compel the defendant company to contract to deliver more water than it has title to, and is here asking the aid of a court of equity to compel the company to *do an act expressly forbidden by law*. *The court cannot order the defendant to violate the statute.*

SULLIVAN, C. J.—This is an original application to this court for a writ of mandate against the defendants, requiring

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them to issue shares of water stock to the plaintiff Robert Rayl, the water to be used in the irrigation of state school lands purchased by said Rayl within a certain Carey Act project commonly called the Twin Falls-Salmon River project.

The defendant Twin Falls-Salmon River Land & Water Company is a Carey Act construction company, organized for the purpose of constructing, operating for a time and disposing of to the purchasers of land within such project the reservoir and canal system and the water rights connected therewith of said Carey Act project. Said company will hereafter be referred to as the Construction Company.

The defendant Salmon River Canal Company is a corporation organized for the purpose of taking title to said system and water rights after the completion of the system, and holding, operating and maintaining the same, and distributing among its stockholders and others, equally and ratably, the water for the irrigation of the lands within said project, and to do all things necessary for the purpose of keeping said canal system in proper repair. The express purpose of said canal company was to receive title from the Construction Company to the canals, dams and franchises of said company, holding and operating the same for the land owners in said project, which company will be hereafter referred to as the Canal Company.

The application for the segregation of the lands within said Carey Act project was made to the state board of land commissioners on August 12, 1907. Prior to that time an application for a permit to appropriate the waters of Salmon river for the land covered by the application was filed with the state engineer, and at the time of filing said proposal the water right permit was also filed, as required by sec. 1615, Rev. Codes.

This application was made by four citizens of the state of Idaho, and contains, among others, the following statements or proposals:

"The undersigned . . . respectfully represent to your Honorable Board that they have been for some time engaged in surveying, estimating and making plans for the construc-

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tion of extensive irrigation works in the County of Twin Falls, in this state, for the purpose of irrigating a large tract of arid land lying to the southerly of the South Side Twin Falls Carey entry. That they desire to, and with the approval of your Honorable Board will, construct irrigation works which will cover and irrigate and render fit for farming and the growing of crops adapted to the climate of that locality upon said tract of arid land, covering and including an area of approximately one hundred fifty thousand acres. . . .

“Your petitioners further represent that if this application meets with the approval of your Honorable Board, that they will cause to be organized a corporation with capital sufficient to complete said works and put the same in operation upon said entire tract within the period of five years from the date of the segregation of the said lands by the United States government.

“Your petitioners, and said corporation so to be formed, propose to construct the irrigation works necessary to properly irrigate for the growing of ordinary farm crops the lands shown on Exhibit ‘A,’ and scheduled in Exhibit ‘B,’ and also such State school lands, Sections Sixteen (16) and thirty-six (36), as lie within said tract.

“The source of the water supply for such irrigation works and plant is a large area of mountainous country forming the water supply to the Salmon River, which rises near the borders of the states of Idaho and Nevada, together with the flow of water in said stream. Reservoirs are to be constructed, which will impound, hold and conserve all of the waters of said watershed and drainage area, which by natural flow will find their way to the bed of said stream, this impounding process to be continued throughout the year. . . .

“Your petitioners propose to sell perpetual water rights, pursuant to the laws of this state and the said so-called Carey Act, for the sum of Forty Dollars (\$40.00) per acre water right. . . . ”

To this application was attached a description of the land sought to be segregated, and also plans and specifications for

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the construction of reservoirs and a canal system for the irrigation of said lands. The state engineer, as required by sec. 1618, Rev. Codes, having reported that there was sufficient unappropriated water in the source of supply to satisfy said project, said application was approved by the state land board and thereafter a proper application was made to the Secretary of the Interior for the approval of said application, and was approved on April 10, 1908, and a contract was entered into between the government and the state on that date.

The Construction Company was organized as a corporation under the laws of this state, and on April 30, 1908, entered into a contract with the state for the construction of the proposed irrigation works, it having taken over all of the interests of the applicants for said segregation. Said construction contract contains, among other things, the following provisions:

Paragraph 1. "The party of the second part agrees to sell shares or water rights in said canal and irrigation system to the person or persons filing upon the lands hereinafter described and also to the owners of other lands, not described herein, but which are susceptible of irrigation from this canal system."

Paragraph 6. " It will sell or contract to sell water rights or shares for land to be filed upon to qualified entrymen or purchasers without preference or partiality other than that based upon priority of application, the water rights having been taken for the benefit of the entire tract of land to be irrigated from the system."

Paragraph 8 provides that the shares or water rights are to be sold to persons filing upon Carey Act lands at a price not exceeding forty dollars per share; also, "To the person or persons purchasing any portion of sections No. 16 or 36, which are susceptible of irrigation and reclamation from this canal, at a price not to exceed Thirty Dollars (\$30.00) per share, provided said water rights are purchased within one year after the purchase of the lands from the State and not exceeding Forty Dollars (\$40.00) per share at any time thereafter."

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It is under the latter clause of this provision that the state claims a preference right to water for state school lands. Regardless of the fact that the Construction Company had agreed with the state to sell water rights to all purchasers of Carey Act lands, as well as school lands, without preference or partiality, the state now asks a preference.

It appears from the conceded facts that there is not sufficient water to reclaim all of the land within said project for which water had been sold prior to the date that plaintiff Rayl purchased his said land from the state. In short, the contention of the state is that it has a preference right for water sufficient to reclaim all of the state school land within said project, amounting to 6,200 acres.

The defense is largely based on the contention that the court should not by writ of mandate compel the Construction Company to furnish water to said state school lands, since to do that would so deplete or decrease the proportionate share of water which could be delivered to Carey Act entrymen that they would not have sufficient water to reclaim their lands, and for that reason they would not be able to obtain a patent to said land from the government, and that their right to a patent would thus be forfeited, as it is contended that patent will not issue from the government unless it appears that an ample supply of water has been furnished in a substantial ditch to reclaim such lands.

This case involves the application of the law to the rights of settlers as between themselves on Carey Act projects, and also the construction to be placed upon the Carey Act as well as the laws of the state applicable thereto, and the contract between the Construction Company and the state.

It was intended by the Carey Act to provide a certain definite plan for the segregation and reclamation of the desert lands, and under the law the machinery for carrying out this plan is provided. The proper construction and application of the law to the facts of this case appears more difficult than in any case that has been presented to this court.

The agreement between the state and the Construction Company at first involved the irrigation of 150,000 acres of land.

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Later on, it appearing that there was not sufficient water to irrigate that number of acres, there was an understanding between the state and the Construction Company that the works should be constructed to cover only 100,000 acres, with leave to enlarge the project if found desirable. Still later on, in order to safeguard the project, an arrangement was made between the parties to said contract whereby only 80,000 acres of the Carey Act land were to be thrown open to settlers; and very soon thereafter 73,348 acres of such land were entered, and shortly thereafter it was understood between the company and the state that no further Carey Act entries should be permitted. These arrangements were amendments to the original contract, and reduced the area of the project to less than one-half of its original acreage.

The Carey Act contracts provide that amendments may be made to them from time to time by agreement between the parties. This was done in order that subsequent conditions which may arise might be properly dealt with, and in order that the intending settler might have notice that such a power was reserved to the state and the Construction Company, subject, of course, to the vested rights of the settlers.

All of the above-stated facts do not appear from the record, but do appear from the public records of the state.

On still later investigation and measurements of the water supply for said project, it appeared that there would not be sufficient water to reclaim more than from fifty to sixty thousand acres. However, it is contended by the plaintiff and counsel who appears as a friend of the court that this makes no difference whatever, since under the proper construction of the Carey Act and the law of this state applicable to Carey Act projects, the plaintiff has a right under the contracts between the state and the government and the state and the Construction Company and the Construction Company and the settler to a water right for the land purchased by him of the state, and this contention is based, first, on the proposition that when this project was initiated and a water permit was taken out by the Construction Company for 1500 second-feet of water, it was dedicated to the irrigation of the land in-

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cluded in said segregation; that by subsequent arrangement this area of land was reduced from 150,000 acres to 73,348 acres of Carey Act and desert lands, plus such school lands as might be in the project, and that a very considerable acreage of said lands so entered had been forfeited under the provisions of sec. 1628, Rev. Codes, so that the project had been reduced in area to about 57,000 acres of entered land; that the water supply thereafter became dedicated to said number of acres of land which were already entered at the time said arrangement was made and to the school lands within said project; and, second, that under the contract and statute, persons obtained water rights for a proportionate interest in the water supply dedicated to said entire tract; that settlers have equal rights in that supply and there is no priority among them; that they share equally in the advantages and disadvantages of the water supply; that a proportionate part of the water supply having in the beginning been contracted for and been set apart to the land in question, such water supply cannot be taken away from it, even though other settlers claim the total supply to be insufficient, since other settlers have no priority; that for those reasons the plaintiff is entitled, under sec. 1615, Rev. Codes, to his proportionate part of the supply, whatever it may be; that such water was set apart to this state land in the beginning and has never been taken away. This latter contention is based upon the state contract with the Construction Company.

On June 1, 1908, about 80,000 acres of said land were thrown open for settlement, and, as before stated, 73,348, were entered. The irrigation works were constructed and notice given that water would be ready for delivery on April 12, 1911. Subsequently about 14,000 acres or more of the lands entered were not settled upon and the rights of the entrymen became forfeited under the provisions of sec. 1628, Rev. Codes. This reduced the area of the project to approximately 57,000 acres. About 30,000 acres of said land was put in cultivation prior to the purchase of said state land by Robert Rayl on June 11, 1915.

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It appeared from the original report of the state engineer that in his opinion there was upward of 400,000 acre-feet of water available for the irrigation of the 150,000 acres of land included in the first segregation. It now appears by measurement made in later years that the average annual flow of said river for the past five years is approximately only 130,000 acre-feet. This difference may be accounted for in several different ways. The state engineer may have made a mistake in his estimates, or in latter years there may have been actually less natural flow than formerly, caused by less natural precipitation in that basin, thus lessening the flow of said river. The state engineer may have gotten his information of the annual flow of said stream from settlers in that region and they may have over-estimated the annual flow thereof. It was represented to the land board by one of the old settlers in that vicinity, as shown by the board's record, that the amount of water in the stream was sufficient to irrigate 150,000 acres of land. The result was arrived at by stating that the stream had a certain width and a certain depth and the flow of the current was at a certain rate, and that this volume of water lasted for a certain period. Examinations of the stream during later years seem to disclose the fact that said river has the width and depth and rate of current mentioned by this old settler, but during late years this flow has not continued for the length of time each season stated by him. That may have been caused by a higher temperature, thus causing the more rapid melting of the snows. This might illustrate the manner in which an error could have been made by the state engineer when he stated that over 400,000 acre-feet of water could be impounded annually for the irrigation of said 150,000 acres of land.

In Vol. 1 of Report of Special Committee, U. S. Senate, on irrigation and reclamation of arid lands, Rep. No. 928, May 8, 1890, p. 40, it is estimated that said Salmon River has a flow of 1820 cubic-feet per second of time, when, as appears from the record, it has an annual flow of less than one-third of that amount of water.

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The holding capacity of the reservoir at one time was supposed to be about 180,000 acre-feet, which, in addition to the natural flow of the stream, was expected to supply a total amount of water in the reservoir of two and three-fourths acre-feet per acre for the land to be irrigated. This idea is gathered from paragraph 4 of the state contract.

It appears from the record that the available water supply is insufficient to properly irrigate more than 50,000 or 60,000 acres of land within said project. However, this matter has not been fully determined; there may not be even sufficient water to properly reclaim that number of acres, and the question is presented whether, under the facts of this case and the law applicable thereto, the plaintiff is entitled to water for the irrigation of his lands and may compel by mandate the defendants to sell him a water right.

A letter dated November 1, 1915, from the Commissioner of the General Land Office is attached to the answer of the Construction Company, in which the commissioner states, among other things:

"I have carefully considered the last report upon this project made by a Carey Act Inspector of this office, some three years ago, various reports on the project by the Geological Survey, the reports of the State Engineer of the State of Idaho, the project engineer, numerous reports of experts, such as Don Bark, on nearby projects similarly situated, and from the mass of data thus considered, have come to the conclusion that I would not be justified in recommending to the Department the approval of over 45,000 gross irrigable acres, including all classes of land under the project, or about 40,000 net irrigable acres.

"It should be understood that when the State presents its list for patent for the lands in this segregation, another full and complete investigation will be made by a Carey Act inspector of this office, and that upon his report, data may be forthcoming which will change this estimate. From present indications however, 40,000 net irrigable acres appears to be the maximum, and such report might show the necessity of a further reduction in area."

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It is contended by S. H. Hays, Esq., who appears as a friend of the court, that since the Land Department of the government had approved the water supply before the land was segregated in said project, that question is no longer open, so far as the government is concerned; that under the Carey Act it was made the duty of the Secretary of the Interior to determine the sufficiency of the water supply before any segregation was made, and that question was determined by him before the project was approved and the land segregated; that after the approval of the project there remained nothing further, so far as the government is concerned, under the law, than the construction of the irrigation works in accordance with the plans and specifications; that all other matters were passed upon in advance of the segregation; that the ample supply of water mentioned in the Carey Act of 1896 refers to the supply which had been predetermined to be sufficient.

The language of the act is that "a patent shall issue when an ample supply of water is actually in a substantial ditch or canal." The water supply might be directly affected by the failure to build the works as provided by the contract; that is, if the works were not constructed with a sufficient capacity to irrigate the land, or if they had not diverted or carried the amount of water proposed in the plans, there would be a failure to provide an "ample supply of water," within the meaning of the act of 1896, and counsel contends that it is to such cases that the act refers and not to cases where nature has failed to furnish the proper quantity of water after the works were constructed.

Counsel also contends that the whole question as to the right of a patent from the government to said lands turns upon the question as to whether the Secretary of the Interior decided that there was a sufficient water supply at the time of the approval of the plan for the construction of the works, and whether having once decided the question of the water supply, he may after the completion of the works reconsider and reverse his former decision.

It is claimed that under the law the state engineer for the state and the Secretary of the Interior for the United States

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government were called upon to determine the sufficiency of the water supply, and that that has been done and the construction of the system was really based on the decision of that question and the adoption of the plans for the construction of the irrigation system. The water supply having been determined to be sufficient, the Construction Company was then willing to go on under the law and complete the system and recover the cost of such construction by selling the water rights and system to owners of the land within said project. The question is fairly presented whether under those facts the government can in good faith now refuse to patent the land to the state and thus defeat the Construction Company in collecting the cost of the system and the settlers from procuring a title to their lands.

The Construction Company was permitted, under the law, to appropriate the water, but only for the purpose of transferring it to the settlers for their use and benefit in connection with the irrigation system constructed by it.

In order to determine the questions involved in this case, it is necessary to consider the plan of reclamation contemplated by the Carey Act and the procedure thereunder, and the character of the grant made by the United States to the state.

Prior to the time of the enactment of said law, there was a demand from the states in which was located a great deal of arid land that the general government grant to each state in the arid region all of the arid irrigable lands within such states. It was in response to these demands that the acts of Congress known as the Carey Acts were enacted (sec. 4 of the act of Aug. 18, 1894, 28 Stats. at Large, 372; Act of June 11, 1896, 29 Stats. at Large, 413; sec. 3 of the act of March 3, 1901, 31 Stats. at Large, 1133), granting to each of the states in the arid region one million acres of land, provided the states would secure the reclamation of such tracts, and authorizing the states to fix a lien upon the land "for the actual cost and necessary expense of reclamation and reasonable interest thereon." In other words, to assess the benefits against

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the land which would accrue by reason of the making of the proposed improvements.

This state, in pursuance of the Carey Act, provided by statute (sec. 1615, Rev. Codes) that proposals and requests might be made to the state board of land commissioners for the building of such works for the irrigation of definite tracts of land to be described in the proposal, the work to be done under the supervision of the state and to the satisfaction of the state engineer. (Sec. 1623, Rev. Codes.) A construction company desiring to build such works may make a proposal to do so for the irrigation of certain definite tracts of land, according to certain definite plans. (Sec. 1615, Rev. Codes.) This proposal really amounts to a bid for the doing of the work or the construction of the irrigation system. Sec. 1617, Rev. Codes, provides that at the time of making such proposal, the construction company "shall have filed with the state engineer an application for a permit to appropriate water for the reclamation of the lands described" in the proposal. This seems to have been deemed a convenient way of attaching the water supply to such project.

By the provisions of sec. 1618, Rev. Codes, the state engineer is required to determine and report "whether there is sufficient unappropriated water in the source of supply, and whether or not a permit to divert and appropriate water through the proposed works has been approved by him; whether the capacity of the works is adequate to reclaim the land described"; and other requirements. This determination of the state engineer seems to have been intended to be final, since it is provided in sec. 1619, Rev. Codes, that "No request on which the State Engineer has reported adversely, either as to the water supply, the feasibility of the construction, the cost or capacity of the works, or as to the character of the lands sought to be irrigated, shall be approved by the board."

The entire plan seems to be one of complete state supervision and control.

The interest which the settler has in the enterprise is defined by said sec. 1615, Rev. Codes, it being thereby required

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that the proposal shall state "the price and terms per acre at which perpetual water rights will be sold to settlers on the land to be reclaimed, said perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises [water rights] attached thereto." This "proportionate interest" was intended to be in the right represented by the water permit taken out for the projects. It was intended that the settlers should ultimately own the entire project—the works and the water rights.

After the approval by the state engineer and by the land board, the plans must be presented, under the state and national laws, to the Department of the Interior for approval. (See sec. 1619, Rev. Codes.) Under the rules and regulations provided by the Land Department of the government, among other things the state is required to furnish "all information necessary to enable this office [the office of the Commissioner of the General Land Office of the United States] to judge of its practicability for irrigating all of the lands selected." (See regulations concerning the selection of desert lands under the Carey Act, 20 L. Dec. 441.) This information was required in order that the United States Land Department might investigate and intelligently pass upon the practicability of the plan and capacity of the works proposed and the sufficiency of the proposed water supply for properly irrigating the lands selected.

After approval by the Department of the Interior, the government may enter into a contract with the state for the patenting of the lands to the state or its assigns. (Sec. 4 of the Carey Act.) The state enters into a formal contract with the construction company to construct the works in accordance with the plans approved by it. (Sec. 1621, Rev. Codes.) Entries of these lands are made before the state land board. Persons entering such lands must present to the state a contract with the constructing company, showing that they have agreed to pay the amount of the lien fixed by the state against the land for the water right and works and that they are entitled to a proportionate interest in the irrigation works and

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appurtenant water supply upon full payment therefor. The form of contract to be entered into between the settler and the construction company must be approved by the state land board.

There are thus three contracts: One between the government and the state, known as the state contract; one between the state and the construction company, known as the construction company contract; and one between the construction company and the settler, known as the settlers' contract. After these three contracts are entered into, the lands, or a portion thereof, may be thrown open for settlement. (Sec. 1625, Rev. Codes.) The state acts in the matter of making the contract and in the approval of a form of settlers' contract, as well as in other matters, as the agent or trustee for the settlers who are in the future to inhabit the land within the project.

Thus it will be seen that before making any contract, the plan for the irrigation works or system must be approved by both the state and national authorities and the sufficiency of the water supply determined by each. Clearly, the general plan is one providing that the cost of the reclamation of such lands shall be assessed as a benefit against the land to be paid by the settler, and that the benefit is assessed through the medium of the state board of land commissioners.

Of course, the engineers of the Construction Company examined the sources of water supply and no doubt satisfied themselves that there would be sufficient water to reclaim the land asked to be segregated; but the determination of the question of the water supply was up to the state and the Secretary of the Interior. In the first instance, if upon such an application the Secretary of the Interior concludes that the water supply is not sufficient, he refuses the application for segregation; and if the state concludes that the water supply is not sufficient, the application is denied. But after the state has decided that question in favor of an ample supply of water, and the Secretary of the Interior has also decided that an ample supply of water exists, that question is settled, so far as the government and the state are concerned.

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That question was evidently understood to have been fully settled by proper authority before the Construction Company would undertake the expenditure of from two to three millions of dollars in constructing an irrigation system. Is it possible that any good business man or corporation would consent to the expenditure of two or three million dollars in the construction of an irrigation system, leaving the question open for the state and government to decide thereafter whether there was a sufficient water supply for the project? It seems to us not.

The only method of remuneration to the Construction Company was a lien on the land and water rights, and, of course, if the Secretary of the Interior should decide before the Construction Company began the construction of the system that there was an ample supply of water, and then when the system was completed decide that there was *not* an ample water supply and refuse to have patents issued for the lands contained in the project, it would certainly be treating the Construction Company in a manner that would not be permitted between private citizens. In fairness to the Construction Company, the government ought not to be permitted at this late day, after the Construction Company has completed its contract so far as the construction of the works is concerned, to refuse to patent to the state or its assigns all land within said project that has been sold by the state upon which settlers have complied with the law in relation thereto.

There no doubt has been a mistake made, both by the state authorities and by the Secretary of the Interior, in estimating the amount of water available for the reclamation of said project, and the Construction Company ought not, in justice or equity, to be required to bear the full burden of such mistake. Neither should the settler be required to bear any greater burden than equity and justice would require, under all of the facts of this case.

If a compromise can be made in this matter so that the number of acres in the project may be scaled down to correspond to the quantity of water actually available, it would be better for all concerned; and the state ought not to insist on

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selling what remains of state school lands in said project to the detriment of settlers to whom it has already sold land, either state school land or land under the Carey Act.

It is clear, under the provisions of the Carey Act and the state law applicable thereto, that the proper officers there referred to must determine in advance the sufficiency of the water supply, the character and kind of system of irrigation that must be constructed and the price to be charged the settlers for an interest therein. This matter is not left to the judgment of the Construction Company. The whole matter must be first approved by the state and then by the federal government. These things are all done before the execution of the contract between the state and the Construction Company. A lien upon the land is provided for to reimburse the Construction Company, and it is not until all these things are done that the land is thrown open for settlement. However, the land may be thrown open for settlement before the works are completed. We think the law is well settled that where officers, such as the state engineer, the state land board and the Secretary of the Interior, are authorized by law to pass upon matters of this character, their decision is conclusive. (*United States v. California & Oregon Land Co.*, 148 U. S. 31, 13 Sup. Ct. 458, 37 L. ed. 354.)

The Secretary of the Interior has the duty imposed on him of examining the water supply and plans for the construction of the works, and approving or rejecting them. If he approves, his action is final at that time, so far as the water supply is concerned.

In the Annual Report of the Commissioner of the General Land Office for 1911, pp. 11 and 12, in speaking of the Carey Act projects, it is said:

“The importance of this [the examination of Carey Act projects] cannot be overestimated, for not only will the lands remain segregated for a long period of time if the order therefor is once made, but in making such segregation the Department is practically committed to the feasibility of the proposition submitted by the State, and the people thereafter dealing with the State are in a great degree entitled to regard the

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proposition of the state as having received the endorsement of the Department."

The Secretary of the Interior in 37 L. Dec. 489, in speaking of Carey Act projects, said: "In brief, the time to ascertain whether the lands are of the character subject to segregation under the Carey Act, and whether there is water available for their reclamation, is prior to segregation."

Under the law the question of the sufficiency of the water supply must be decided by the Secretary of the Interior when the application for segregation and plan are presented to him. That is the purpose and object of their presentation, and if the plan is not feasible and the water supply not sufficient, it is the duty of the Secretary to reject it; but if he finds it feasible, it is his duty to approve it, and he did approve the plan in this case. When the Secretary gave his approval, he gave it with the knowledge that the lands were then and there segregated from the public domain, and upon his approval a lien would be fixed by the state, under the statute, on the land for the cost of the construction of the system, which lien must be paid by the settler; that large sums of money must be expended in the construction of irrigation works for the reclamation of the land upon the faith of the lien so established. Those matters which after the presentation of the plan can be affected by human agencies, such as the construction of the works, are for subsequent determination; the others are not. The company building the works is a construction company only. It constructs the works and payment to it must be made from the lien fixed by law upon the land. The Secretary of the Interior in effect said to the construction company and the state, "If you build these works, as per the plan as approved, the grant of land is earned."

No doubt the state authorities had sufficient evidence before them on which to hold that the supply of water would be amply sufficient to reclaim the land in said project, and the same may be said of the Land Department of the United States. However, it is well known that the water supply of streams in the arid region fluctuates considerably from year to year, so that the question of the sufficiency of the water

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supply for the irrigation of a tract of land must always be a matter of approximate estimate.

There is also another factor affecting irrigation projects, and that is the same volume of water will suffice to irrigate much more land after the land has been cultivated a few years than it will in the earlier stages of the irrigation thereof. Taking the fluctuations of the water supply in the streams year after year in arid regions, the variableness of the seasons and the fact that the same supply is much more efficient in an older project than it is in a new one, it will at once be observed that the question of water supply for a certain tract of land is a question of estimate. If the proof presented to the Secretary of the Interior had not been sufficient, he would not have approved the project, since in this case no question of fraud arises. When this plan was approved, the question of the water supply was determined. The natural water supply is a thing that cannot be changed by human effort, and the only thing to be done after the approval of the plan by the Secretary of the Interior was to build the works in accordance with the plan. If that is done by the company, it has performed its duty, provided it has done nothing adversely affecting the water supply originally provided for the project.

As before stated, the Construction Company was not the owner of the water. Under the law it was permitted to make an appropriation of the water for a specific purpose, and before such appropriation was completed, it must construct works amply sufficient to carry such water for irrigation to the place of intended use, as provided by the contract with the state.

Under the general laws, sec. 3289, Rev. Codes, any water company or corporation is forbidden to contract or sell more water than it is entitled to, and the general law clearly contemplates that such a corporation must not sell more water than it has. The contract of the state with the Construction Company authorized the sale of water only to the extent of the water right acquired for the reclamation of the lands in the project, and forbids the issuance of water contracts in excess

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of the appropriation for water. The appropriation permit issued by the state engineer to the Construction Company permitting it to appropriate 1,500 cubic-feet of water per second of time was simply a permit to appropriate that amount of water provided there was that amount in the source of supply. It would be impossible for the Construction Company to appropriate 1,500 cubic-feet of water in a certain locality where there were not to exceed 500 cubic-feet that would be supplied from that source.

The permit is simply a legal document, rather than the actual appropriation of water, since a permit cannot place 1,500 cubic feet of water per second of time where nature has placed only about one-third of that amount.

It is clearly manifest from said contract that notwithstanding the estimated water supply, the state realizing the possibility of error in weather forecasts, expressly provided that wafer contracts should not be sold in excess of the water rights belonging to the company. By the terms of the state contract the company agreed to sell shares of water rights "to the extent of the water rights to which it is entitled . . . but in no case shall water rights or shares be dedicated to any lands before mentioned or sold beyond the carrying capacity of the canal or in excess of the appropriation thereof."

This language ought not to be construed to mean that the company might sell water rights for far more land than its water supply could reclaim. To do so would be to ignore both the spirit and the letter of the contract between the state and the company.

It has been suggested by the attorney general that the decisions in the case of *State v. Twin Falls Canal Co.*, 21 Ida. 410, 121 Pac. 1039, and *State v. Twin Falls Canal Co.*, 27 Ida. 728, 151 Pac. 1013, have established the right of every acre of land in a Carey Act project to a proportionate interest in the water supply, no matter how inadequate the supply may be. Neither of said cases support that contention. In both of those cases the court held that the water supply was insufficient and in the West case stated as follows: "There is noth-

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ing in the record to show that said amount of water is not amply sufficient to properly irrigate all of the land if used in turn," etc. The full amount of water appropriated for the project involved in the West and Weaver cases, to wit, 3,000 second-feet, was available at the head of the canal, whereas in the instant case, no more than one-third of the 1,500 second-feet attempted to be appropriated is available for the irrigation of the land within the project under consideration. Those decisions establish the law applicable to those cases where the water supply is shown to be adequate, but they have no application to cases where the water supply is not adequate or sufficient. The West and Weaver cases do not hold that where the water supply is inadequate, it must be divided up so as to make it impossible to reclaim the land in the project. Those decisions have no application to the case at bar. It was not the intention of the framers of the constitution nor of the several irrigation acts of the legislature to have the public waters of the state so distributed as not to properly irrigate the agricultural lands for which they may be appropriated, and thus make a failure of the proper reclamation of our arid lands.

It is declared by sec. 3, art. 15, of the state constitution that "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall not be denied. Priority of appropriation shall give the better right as between those using the water." The state authorities cannot set aside those provisions of the constitution by holding that the state may reserve water for all state lands for an indefinite time or until all state lands may be sold, since at the present rate of sale under the law, it would take at least 150 years to sell all of the state lands. The constitution and the law clearly contemplate that as between agricultural appropriators of water, the first in time shall be the first in right. But it may be said that the water appropriated for the project under consideration was intended for the entire project. That is very true in case there had been sufficient water supply available for the reasonable reclamation of all of the land within such project. However, the state ought not to be per-

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mitted, under the law and the facts of this case, to take water from those settlers on said project who had purchased their water right and applied it to a beneficial use prior to the sale of the land to Rayl.

As I view it, it is most unfair, unjust and inequitable for the state to insist on such a construction of said contract as would deprive the purchaser of Carey Act land of sufficient water to reclaim his land, provided he had purchased his water right and land prior to the sale of the school land. That certainly would be the result if the water supply is only sufficient to reclaim one-third of the land in said project, and if the settler must pay forty dollars for an acre water right and then only get one-third of an acre right, that would make it cost him \$120 per acre water right, instead of forty dollars as per his contract.

The theory of "proportionate share" of the water appropriated ought not to be adopted in this case, as it would certainly result in the financial ruin of many of the settlers, since it would be impossible for them to pay for their water right at the rate of forty dollars an acre and support their families and get only water sufficient to reclaim a third of their land.

It is not true that the contract for the state for water to reclaim the school lands is of any higher order than the contract of the settler with the construction company for water to reclaim the Carey Act land which he purchased from the state. The state is the party which made the first mistake in regard to the amount of water available for said land, and the settler clearly understood that the state was promoting said project. The state as well as Rayl well knew when Rayl purchased said school land that the water supply for said land had long prior to his purchase been exhausted.

The state in dealing with a Carey Act project is in substance making a contract for the improvement of land which the government has contracted to grant to it. It is not dealing in its governmental capacity, but in its capacity as private owner improving his own property—in a proprietary capacity.

Generally the doctrine of equitable estoppel does not apply

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to the government. (16 Cyc. 780.) There are, however, exceptions to this rule. (See *United States v. Stinson*, 125 Fed. 907, 60 C. C. A. 615; *United States v. Willamette Valley etc. Road Co.*, 54 Fed. 807.)

In the *Stinson* case the court said: "When the government seeks its rights at the hands of a court, equity requires that the rights of others as well, should be protected. (*Carr v. United States*, 98 U. S. 432, 438, 25 L. ed. 209, 211.) The government may not in conscience ask a court of equity to set on foot an inquiry that, under the circumstances of the case, would be an unfair or inequitable inquiry. The substantial considerations underlying the doctrine of estoppel apply to government as well as to individuals."

It is very true that the government should not be affected by the laches of its agent, and this doctrine is covered by the general rule. In a case such as the one under consideration, however, the state may properly be estopped from taking conflicting positions at different times without just reason.

2 Pomeroy on Equity Jurisprudence, sec. 804, states: "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract or of remedy, as against another person who has in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy."

The state here is claiming the right to compel the Construction Company to give Robert Rayl a water right contract for certain school lands. The record shows that, with the consent of the state, settlers had purchased from the state between 50,000 and 70,000 acres of land in said project, some 30,000 acres of which were put in cultivation through irrigation by water rights purchased from the Construction Company by and with the consent of the state prior to the time that the plaintiff Rayl made his purchase of the school land here involved, which purchase was of the date June 11, 1915.

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Then the question arises whether under the circumstances and facts of this case an estoppel arises against the state. It is conceded that there is not water sufficient to properly irrigate more than 50,000 or 60,000 acres of the land within said project, and the question also arises whether in good morals and common honesty the state may require the settlers who purchased water for the irrigation of their lands long prior to the time that the school land was sold to the defendant Rayl, with the state's consent and approval, to give up without compensation a part of such water for the irrigation of the lands sold by the state to Rayl.

It seems to me quite clear that under the facts the state ought not to be permitted to succeed in this case, provided there is not sufficient water to irrigate all of the lands that were held in said project under valid contracts made prior to the sale of the land by the state to Rayl. No good reason can be offered why the state in its dealings with this matter should be unaffected by considerations of morality and right, which ordinarily bind the conscience, and the observance of honesty and fair dealing on the part of the state may become of higher importance than reserving water for the irrigation of school lands, which water the state had consented to sell to the settler upon land which the state itself had sold to him. As was said in *Woodruff v. Trapnall*, 10 How. (51 U. S.) 190, 13 L. ed. 383, we naturally look to the action of a sovereign state to be characterized by a more scrupulous regard to justice and higher morality than belong to the ordinary transactions of individuals.

We are clearly of the opinion that under the facts of this case the state and Rayl are estopped from procuring or claiming the right sought in this proceeding.

It is the contention of the state that water from said project must be supplied to the state school lands at all hazards, and that even if the settlers on said project had purchased prior to the time of the sale to Rayl all of the water which said system could furnish, and all of which water was necessary for the irrigation of their lands, the settlers must give up sufficient water to reclaim and properly irrigate all of the

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school lands within said project, thus losing to the state, to their detriment, a part of the water necessary to the proper irrigation of their lands.

It is suggested by counsel for the state that the state board of land commissioners did not contract to dispose of all of the available water supply tributary to said school land. We concede that, since said board did not have the disposal of any of the public waters of the state, nor the right to reserve any of the public waters of the state as against prior appropriators. Under the provisions of sec. 3, art. 15, of the state constitution, priority of appropriation gives priority of right, and it is there declared that the right to divert and appropriate the unappropriated waters of any natural stream in this state to a beneficial use shall never be denied. And since all of the water within said project had been appropriated long prior to the time Rayl made his purchases, the state has no right or authority to take such water from a prior appropriator and give it to a subsequent purchaser of school land.

The state had full knowledge that there was not sufficient water for the proper irrigation of the lands it had sold prior to the time it sold said land to Rayl. And under the facts, had the state the right to represent to Rayl, or to lead him to believe, that there was sufficient water within said project for the irrigation of the lands sold to him? Should the state be permitted to say, when conducting a business in its proprietary capacity, that there was a sufficient supply of water for all lands within said project, when it knew that such was not the case, and that there was not a sufficient supply for more land than had already been sold prior to the sale to Rayl?

The state is here seeking to take water from settlers who made their purchases long prior to the purchase made by Rayl, and give a portion thereof to Rayl. The settlers were led to believe, and justly so, that the state had examined the water supply and determined that it was amply sufficient for said entire project, and it was upon such representations that the lands were sold to the settlers by the state. From the

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position of the state in this matter, it should act with fidelity and integrity toward the settlers.

In this case, the state, the Construction Company and the operating company all admitted the insufficiency of the water supply to properly irrigate and reclaim more land than was sold prior to the sale to Rayl. The state knew, and admits that it knew, that the water supply was insufficient, but contends that state school lands have a priority over other lands, even though the other lands had been reclaimed years before the sale of the school land.

There is clearly an equitable estoppel against the state which arises out of its conduct in this matter.

And Rayl is in no better position than the state. He had full knowledge that the water supply was not sufficient to properly irrigate the land that had already been sold. Under the facts of this case, the principles of estoppel clearly apply, and the state is not entitled to a priority of right to any of said water for its state lands, unless it should be determined that the water rights already sold are not necessary to the proper reclamation of the lands sold prior to June 11, 1915, the date when the state sold to Rayl the land here involved.

The alternative writ heretofore issued must be quashed and the preemptory writ denied. Costs awarded to defendants.

BUDGE, J.—I concur in the conclusions reached in the opinion of Chief Justice Sullivan under the facts of this particular case.

MORGAN, J., Concurring.—As I view this case, the real question presented is, have school lands a superior claim to water rights over other lands embraced within the project? If such a preference exists it must be found in the contract, a copy of which is attached to the complaint as exhibit "C," and which is referred to in the foregoing opinion as having been entered into between the state and the Construction Company.

A very careful examination of that document fails to disclose any expression from which it may be inferred that it

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was the intention of the contracting parties to reserve from Carey Act and other lands, in the event there was not enough for all, sufficient water to irrigate school lands or that they should be preferred over others in the distribution. Upon the other hand, the language employed indicates that water rights should be sold to qualified entrymen or purchasers without preference or partiality. At the time the contract was entered into all parties to it believed there was a water supply ample to reclaim and properly irrigate the 150,000 acres of land embraced within the original project; no preference was believed to be necessary and none was provided for, but it was expressly agreed: "The sale of water rights to the purchasers shall be a dedication of the water to the lands to which the same is applied."

The contention that the water supply shall be divided up and distributed over all the land now within the project, regardless of how small an amount would thereby be available for any portion of it, cannot be supported.

The purpose of the Carey Act of Congress and of our legislative enactments accepting for Idaho its benefits is the reclamation and irrigation of desert lands in a manner and to an extent that will make them productive and valuable for agricultural purposes.

In conformity to these laws and pursuant to its agreement with the state, contracts were entered into between the Construction Company and settlers, the form of which was approved by the state, wherein it was agreed that certificates of shares of the capital stock of the canal company, thereafter to be formed, should be issued to purchasers of land and water rights, in each of which was to be recited: "This certificate entitles the owner thereof to receive one-hundredth of a cubic-foot of water per acre per second of time for the following described land: [here occurs a blank for the description] in accordance with the terms of the contract between the State of Idaho and the Twin Falls-Salmon River Land & Water Company. . . . "

It appears from the record in this case that prior to the application for a water right by plaintiff, Rayl, more than

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enough of these settlers' contracts had been sold and were outstanding to consume the entire water supply available. It follows that to require the defendant, Construction Company, to issue to him the shares of stock which he demands would be a vain and useless proceeding, for it would amount to an order that it issue to him a contract obligating itself and its successor to do the impossible, viz.: Supply him with water which has heretofore been dedicated and become appurtenant to the lands of others.

For the foregoing reasons I concur in the conclusion that the relief prayed for should be denied.

I am not in accord with that portion of the opinion which is to the effect that the state, in dealing with a Carey Act project, does so in its capacity as a private owner. As I understand the Carey Act, its purpose is to procure the reclamation, settlement and cultivation of desert lands, and, with that end in view, provides that such lands may be patented to the state wherein they are located with the ultimate object that they find their way into the hands of settlers. If this is a correct interpretation of the law, the state takes title by virtue of its sovereignty, not as an owner, but in trust for the use and benefit of the settler.

Entertaining these views, I cannot agree that the doctrine of estoppel has any application here.

I am unable to concur in the portion of the opinion which is to the effect that the approval by the Secretary of the Interior of the plan for reclamation of the land embraced within this project, and his finding that the water supply was adequate before the contract for construction was entered into, is conclusive upon the United States. This is a question which must address itself to the officials of the Department of the Interior and, possibly, to the federal courts, but is one not within our jurisdiction to decide.

Opinion of the Court—Rice, J., on Rehearing.

(July 8, 1917.)

ON REHEARING.

MANDATE—MUTUAL MISTAKE OF FACT—CAREY ACT PROJECT.

1. A writ of mandate will not issue from this court to compel a Carey Act construction company to issue shares of stock to a purchaser of state school land where the shares of stock already sold are far in excess of the available water supply and the contract entered into between the construction company and the state of Idaho was entered into under a mutual mistake of a material fact.

2. Where a purchaser of school lands under a Carey Act project could not possibly obtain the amount of water his contract would entitle him to receive, and the issuance of shares of stock to the said purchaser would in effect defeat the rights of prior settlers to the water to which they are entitled under their contracts, a writ of mandate will not issue to compel the construction and canal company to sell shares of stock to said purchaser of school land.

3. The state of Idaho in dealing with a Carey Act project acts by virtue of its sovereignty and not in the capacity of a private owner.

4. The doctrine of estoppel cannot be invoked against a sovereign state.

RICE, J.—A rehearing was granted in this case, and the matters involved therein have been re-examined. This is an original application in this court for a writ of mandate to compel the Twin Falls Salmon River Land & Water Company and the Salmon River Canal Company to issue shares of water stock to plaintiff Robert Rayl for water to be used in the irrigation of state school lands purchased by said Rayl in accordance with the terms of a certain contract entered into between the defendants and the state of Idaho.

Upon the argument on rehearing of the case it was admitted by counsel for the state that the state by its contracts had not reserved any preference rights for its lands, and that purchasers of state land occupied no better position by reason of having purchased such land than any other person making application to purchase water rights from the defendants, except

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that the state's contract with the Construction Company was prior in time to any contract between the Construction Company and a settler. It was also admitted that the available water supply is not sufficient to properly irrigate the lands for which contracts are already outstanding. The plaintiffs contend, however, that according to the terms of the contract the water supply becomes immaterial; that the plaintiff Robert Rayl, as a purchaser of state lands under said contract, is entitled to a "proportionate interest in said canal and irrigation works, together with all rights and franchises therein, based on the number of shares finally sold in said canal."

The provisions of the various contracts involved in the consideration of this application are very fully set out in the opinion of Chief Justice Sullivan, and it will be unnecessary to repeat them here. It would probably be sufficient to state that the contract between the state of Idaho and the defendant Construction Company was entered into under a mutual mistake of existing conditions, and upon the assumption that certain facts with reference to the water supply existed, which as a matter of fact do not exist. Under such conditions the court will not by its writ in effect decree specific performance of a contract which neither party thereto contemplated when the agreement was executed.

However, the settlers who had purchased water rights from the Construction Company are entitled to consideration in this matter upon their petition in intervention. The contract between the state of Idaho and the Construction Company not only provided that the settlers should be entitled to receive their proportionate interest in the canal and irrigation works, together with all rights and franchises therein based on the number of shares finally sold in said canal, but also that each share should represent a carrying capacity in said canal sufficient to deliver one-hundredth of a cubic-foot of water per acre per second of time. Said contract also provided, in the tenth paragraph thereof, that the certificate of shares of stock in the Salmon River Canal Company, Ltd., should be made to indicate and define the interests thereby represented in the said system, to wit: A water right of one-hundredth of a

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cubic-foot per second for each acre of land irrigated as provided in paragraphs IV and VIII of the contract and a proportionate interest in the said canal and irrigation works based upon the number of shares ultimately sold therein.

The contract between the Construction Company and the settlers on the project in effect provided that the owner of a certificate of stock should be entitled to receive one-hundredth of a cubic-foot of water per acre per second of time upon the land described in the certificate, in accordance with the terms of the contract between the state of Idaho and the defendant Construction Company, and that the certificate should also entitle the owner to his proportionate interest in the dam, canal, water rights and other rights and franchises of the Twin Falls Salmon River Land & Water Company, based upon the number of shares finally sold in accordance with the said contract between the said company and the state of Idaho. It would be an unwarranted construction to hold that by reference to the contract between the state and the Construction Company all that was intended was to state that the owner of the certificate of stock in the Salmon River Canal Company, Ltd., should be entitled only to his proportionate interest in the canals, water rights, etc., of the company based upon the number of shares finally sold to settlers. If carried to its ultimate conclusion, by such construction the settler might be deprived of any water right whatever.

It should be noted that the provisions of the statutes of the state are expressly referred to and made a part of the contract between the Construction Company and the settler. By sec. 3293, Rev. Codes, it is provided that no person entitled to the use of water from any ditch or canal must, under any circumstances, use more water than good husbandry requires for the crop or crops that he cultivates. By reading this law into the contracts, it would follow that the settler is entitled to receive the amount of water specified in his contract to the extent necessary to irrigate the crop or crops which he cultivates in accordance with the usages of good husbandry. He would not be entitled to receive a greater amount than is

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necessary to irrigate his crops, nor in any event a greater amount than that specified in the contract.

It being conceded that the actual water supply is wholly insufficient to furnish the settlers with the amount of water to which they are entitled under their contracts, it necessarily follows that the plaintiff Robert Rayl could not possibly obtain what his contract would entitle him to receive. Moreover, if a writ should issue, its effect would be to defeat the intervenors to a still further extent in obtaining the rights to which they are entitled under their contracts. It cannot be held that the defendants owe a duty to the state of Idaho to make the contract prayed for in the petition.

Upon consideration of the case on rehearing this court is of the opinion that the state in dealing with a Carey Act project acts by virtue of its sovereignty and not in the capacity of a private owner, and that the doctrine of estoppel cannot be invoked against a sovereign state.

With reference to the question of the finality of the action of the state and the Department of the Interior in determining that sufficient water supply existed and its bearing upon the right of the state to receive patents for the public land segregated from the public domain upon the application of the state, it should be noted that since the argument upon rehearing was had, the circuit court of appeals for the ninth circuit has rendered its opinion in the case of *Twin Falls Salmon River Land & Water Co. v. Caldwell* (C. C. A.), 242 Fed. 177, upon appeal from the United States district court for Idaho, in which it held that the action of the Secretary of the Interior in approving the proposed plan for the irrigation of public lands applied for by the state, and in making an order segregating those lands from the public domain, was not a conclusive determination against the United States that the state of Idaho was entitled to a patent therefor for the benefit of the settlers. Although this question was presented upon the argument, it is not involved in the matter before the court.

The alternative writ will be quashed and the peremptory writ denied. Costs awarded to defendants.

Budge, C. J., and Morgan, J., concur.

Opinion of the Court—Morgan, J.

(January 26, 1917.)

EVVA L. KELLER, Respondent, v. FRED L. KELLER,
Appellant.

[162 Pac. 927.]

NOTICE—SERVICE OF—NONRESIDENT.

1. Service of notice of motion to amend and modify a decree of divorce need not be personal upon a party who has appeared in the action and has thereafter departed from, and resides out of, the state.

[As to necessity for personal service of notice in absence of express requirement as to manner of service, see note in *Ann. Cas.* 1915A, 222.]

APPEAL from the District Court of the Fourth Judicial District, for Twin Falls County. Hon. Chas. O. Stockslager, Judge.

Motion to amend and modify decree of divorce. Overruled and service of moving papers quashed. *Reversed.*

The service of moving papers upon an adverse party need not be personally made upon such adverse party. (Sec. 4891, Rev. Codes.)

This statutory provision was complied with on the part of the appellant, and also by the act of the clerk of the district court in mailing a copy of each of the moving papers to the respondent at her place of residence in California. (*Collins v. Brown*, 19 Ida. 360, 364, 114 Pac. 671; *Silva v. Serpa*, 86 Cal. 241, 24 Pac. 1013.)

J. C. Rogers and W. P. Guthrie, for Respondent, file no brief.

MORGAN, J.—On March 4, 1914, respondent was granted a decree of divorce from appellant wherein the custody of their three minor children was awarded to her and wherein appellant was directed to contribute \$30 per month toward their support and education.

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On July 8, 1914, appellant caused to be served upon one of the attorneys for respondent in the divorce proceeding notice of motion for an order amending and modifying the decree to the end that custody of the children be awarded to him instead of to respondent, and that the provision requiring him to pay \$30 per month to her be stricken therefrom.

A copy of the motion, together with a copy of appellant's affidavit in support of it, were served with the notice.

Respondent's former attorney refused to accept service of the papers, assigning as a reason that his authority to represent her had terminated, and proof of service was made by the affidavit of appellant's counsel from which it appears that respondent did not reside within the state of Idaho and that her place of residence was No. 1425 West Thirty-seventh Drive, Los Angeles, California.

Thereafter a like notice, motion and affidavit were served upon the clerk of the district court for Twin Falls county, by delivering to and leaving with him a copy thereof, and he certified that on July 15, 1914, he mailed the copies, so delivered to him, to respondent at her place of residence, as above stated, by registered mail and that he prepaid the postage thereon.

The record discloses that at the time the motion was heard counsel for plaintiff in the divorce proceeding stated to the court that they had, theretofore, had some correspondence with her looking toward their employment in the matter, but that they had not yet been employed to act therein as her attorneys, and they asked to be permitted to appear specially for the purpose of moving to quash the service of notice of motion upon the ground that personal service of the moving papers had not been made upon respondent, who was, and had been for some time theretofore, a nonresident of the state. Over objection of counsel for appellant they were permitted to so appear, and, argument having been heard by the court, it was ordered that the application and motion for an order amending and modifying the decree of divorce be denied and overruled and that the motion to quash the service of the moving papers be granted. This appeal is from that order.

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It is apparent from the language employed in the court's order that the motion to quash was granted upon the theory that service of such a notice as is here under consideration, if made upon a nonresident of the state, must be personal. This is erroneous.

It is provided in sec. 4893, Rev. Codes: "When a plaintiff or a defendant, who has appeared, resides out of the State, and has no attorney resident of the State in the action or proceeding, the service may be made on the clerk for him. . . . "

Sec. 4890, Rev. Codes, is as follows: "Service by mail may be made where the person making the service and the person on whom it is to be made reside, or have their offices, in different places between which there is a regular communication by mail."

Sec. 4891 provides: "In case of service by mail the notice or other paper must be deposited in the postoffice, addressed to the person on whom it is to be served, at his office or place of residence, and the postage paid. . . . "

After respondent appeared in the action she removed from the state and since has been a nonresident. She had no attorney residing in the state and service was made upon the clerk for her, pursuant to sec. 4893, who served the moving papers upon her by mail, as provided by sec. 4890, in the manner prescribed by sec. 4891. The service was sufficient (*Empire Mill Co. v. District Court*, 27 Ida. 383, 149 Pac. 499), and the action of the trial court in sustaining the motion to quash was erroneous.

The order appealed from is reversed. Costs are awarded to appellant.

Budge, C. J., and Rice, J., concur.

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Points Decided.

(January 27, 1917.)

V. F. NETTLETON, Respondent, v. J. F. COOK, as Administrator of the Estate of ROBERT E. NEITZEL, Deceased, Appellant.

[163 Pac. 300.]

MALICIOUS PROSECUTION — PROBABLE CAUSE — PROSECUTION UNDER WRONG STATUTE AND DISCHARGE—ACTUAL COMMISSION OF CRIMINAL OFFENSE.

1. In an action for malicious prosecution, probable cause, as a basis for instituting the prosecution complained of, is the existence of such facts or circumstances as would excite the belief in a reasonable person, acting on the facts within the knowledge of the prosecutor, that the one charged was guilty of the crime for which he was prosecuted.

2. Where plaintiff in an action for malicious prosecution shows that he was discharged by the committing magistrate after the holding of a preliminary examination, such discharge is *prima facie* evidence of want of probable cause but is not conclusive; and if it appears affirmatively from evidence introduced upon the trial that he was in fact guilty of an indictable misdemeanor, although not the one for which he was attempted to be held for trial, but of an indictable misdemeanor which was so closely akin thereto that the county attorney in drafting the criminal complaint inadvertently charged the defendant under the wrong section of the statute, want of probable cause is thereby rebutted, and the prosecutor cannot be held in damages.

3. In an action for malicious prosecution, the fact that the plaintiff was not charged in the prosecution complained of under the proper statute with the commission of a criminal offense, is not evidence of bad faith or malice on the part of the prosecutor, if the latter had reason to believe the accused guilty of a crime, and such belief was based either upon personal knowledge or information received from others, upon which he relied in good faith, and such facts had been communicated to the county attorney.

4. *Held*, under the facts of this case, that as it affirmatively appears from the record, and from respondent's own testimony, that he was guilty of a criminal offense against the laws of the state, but through inadvertence was charged under the wrong statute without any fault on the part of Neitzel, he cannot be permitted to maintain this action for malicious prosecution.

[As to acquittal in criminal prosecution as evidence, in action for malicious prosecution, of want of probable cause, see note in *Ann. Cas.* 1916E, 376.]

Argument for Appellant.

APPEAL from the District Court of the Third Judicial District, for Owyhee County. Hon. Charles P. McCarthy, Judge.

Action to recover damages for malicious prosecution. Motion for nonsuit denied. Judgment for plaintiff. *Reversed*.

Barber & Davison, for Appellant.

If the appellant had reasonable cause to believe, and did believe, that respondent had violated the law in the destruction of or interference with the headgate of the Murphy Land & Irrigation Co., notwithstanding the action of the probate court in refusing to hold respondent to the district court, the evidence did not sustain the verdict, and did not entitle respondent to recover any sum in this cause. (*Russell v. Chamberlain*, 12 Ida. 299, 303, 9 Ann. Cas. 1173, 85 Pac. 926; *Potter v. Seattle*, 8 Cal. 217, 221; *Grant v. Moore*, 29 Cal. 644, 656; *Anderson v. Coleman*, 53 Cal. 188; *Vesper v. Crane Co.*, 165 Cal. 36, 130 Pac. 876, L. R. A. 1915A, 541.)

Appellant had taken every reasonable precaution and had conducted himself as a reasonable and cautious man would conduct himself by laying before the public prosecutor, a constituted authority, the facts as given him, bringing himself clearly within the authorities defining probable cause. (26 Cyc. 24, and cases cited; *Smith v. Liverpool etc. Ins. Co.*, 107 Cal. 432, 433, 40 Pac. 540; *Davis v. Pacific Tel. & Tel. Co.*, 127 Cal. 312, 57 Pac. 764, 59 Pac. 698.)

And the question does not turn upon the actual innocence or guilt of the accused, but upon the prosecutor's belief at the time upon reasonable grounds. (*Burlingame v. Burlingame*, 8 Cow. (N. Y.) 141; *French v. Smith*, 4 Vt. 363, 24 Am. Dec. 616; *Foshay v. Ferguson*, 2 Denio (N. Y.), 617.)

If one submits his case to counsel and in good faith receives advice justifying a prosecution, and acting on that advice institutes the prosecution, he is entitled to immunity from damages. (26 Cyc. 16, 32; *Sandell v. Sherman*, 107 Cal. 391, 40 Pac. 493; *Struby etc. Mercantile Co. v. Kyes*, 9 Colo. App.

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190, 48 Pac. 663; *Staunton v. Goshorn*, 94 Fed. 52, 36 C. C. A. 75; *Johnson v. Southern Pac. Co.*, 157 Cal. 333, 107 Pac. 611.)

Perky & Crow, for Respondent.

No one has the right to cause the arrest of another as an experiment, and an arrest under such circumstances is malicious. (*Johnson v. Ebberts*, 11 Fed. 129, 6 Saw. 538.)

“Malice may be presumed not only from the total absence of probable cause, but also from gross and culpable negligence in omitting to make suitable inquiries.” (26 Cyc. 51.)

“To justify by advice of counsel defendant must show that he or his prosecuting agent truthfully and correctly, fully and fairly and in good faith stated to such counsel all the facts bearing upon the guilt or innocence of the accused.” (26 Cyc. 34.)

Before the prosecutor can rely upon the advice of counsel as a defense, it must be shown not only that he fully and fairly stated all of the facts in his possession concerning the offense, but he must have stated all facts of which he had been put upon inquiry. (*Flickie v. Oberson*, 82 Minn. 82, 84 N. W. 651; *Atchison, T. & S. F. R. Co. v. Brown*, 57 Kan. 785, 48 Pac. 31; *Whitehead v. Jessup*, 2 Colo. App. 76, 29 Pac. 916; *Jeremy v. St. Paul Boom Co.*, 84 Minn. 516, 88 N. W. 13; *Dawson v. Schloss*, 93 Cal. 194, 29 Pac. 31; *Steed v. Knowles*, 79 Ala. 446; *Norrell v. Vogel*, 39 Minn. 107, 38 N. W. 705; *Willard v. Holmes etc.*, 2 Misc. Rep. 303, 21 N. Y. Supp. 998; *Leahey v. March*, 155 Pa. St. 458, 26 Atl. 701; *Barhight v. Tammany*, 158 Pa. St. 545, 38 Am. St. 853, 28 Atl. 135; *Flora v. Russell*, 138 Ind. 153, 37 N. E. 593; *Cointement v. Cropper*, 41 La. Ann. 303, 305, 6 So. 127.)

BUDGE, C. J.—This is an action to recover damages for an alleged malicious prosecution. The material facts out of which this litigation arose, briefly stated, are as follows; several years prior to the commencement of this action the Murphy Land & Irrigation Company, Limited (which will hereafter be referred to as the “Water Company”), con-

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structed a dam across Sinker Creek in Owyhee county, for the purpose of impounding the natural flow of the waters of that stream. Prior to the construction of this dam a portion of the waters of Sinker Creek had been appropriated and used by settlers along the stream. For the purpose of determining the relative priorities of the various claimants an action was instituted in the district court for Owyhee county by Matthew Joyce et al. against the Water Company, which was pending at the time the controversy herein related occurred. During the pendency of this suit the Water Company had agreed with the other claimants to turn into the bed of the stream below the dam the same quantity of water that was entering the reservoir by means of the channel of Sinker Creek.

The respondent in this action was in charge of the Joyce ranch, which was among the other claimants above mentioned. Neitzel at the time of the controversy was, and had been for some time prior thereto, the secretary and treasurer of the Water Company, and was also general manager of the dam and reservoir. An employee of the Water Company, Martin M. Welch, was in immediate charge of the dam and reservoir and controlled the various headgates and canals.

A dispute arose between respondent and Welch in regard to the amount of water that was being released by the Water Company under its agreement. The respondent contending that something over 600 miner's inches was running into the reservoir and that no such quantity was being permitted to flow out of the reservoir into the creek below. And he thereupon took possession of the dam and turned a considerable quantity of water into the creek, so that it would proceed to the Joyce ranch. There is a decided conflict in the evidence as to whether or not Welch objected to respondent's conduct in increasing the flow of water into the creek. However, there is no conflict in the evidence that later Welch re-adjusted the gate and placed a chain and padlock upon it, which the respondent, after a more or less serious controversy with Welch, broke with an iron bar, raised the gates and permitted a large quantity of water to escape from the reser-

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voir into the creek. Nor is it disputed that respondent stood guard over the dam until far into the succeeding night and would not permit Welch to adjust the gates until some temporarily satisfactory arrangement was made.

After Neitzel stated these facts, communicated to him by Welch, to the county attorney of Owyhee county, the latter informed him that it would be necessary to determine whether or not a criminal action would lie, and for that purpose he desired time to look into the question. Shortly thereafter he telephoned Neitzel and informed him in effect that the respondent was guilty of an indictable misdemeanor. It was thereupon arranged by Neitzel and the county attorney that a criminal complaint be sworn to by the county attorney, which was done, and a warrant was thereupon issued out of the probate court and later served upon the respondent, who subsequent thereto appeared in said court, where at the date fixed a preliminary examination was held, at which time the depositions of the witnesses offered on behalf of the state were taken. The probate court, sitting as a committing magistrate, after hearing all the testimony offered by the state, discharged the respondent. Thereafter this action was brought in the district court of the third judicial district for Owyhee county, to recover damages for a malicious prosecution, which resulted in a verdict in favor of respondent.

Neitzel, however, offered no testimony but at the conclusion of respondent's case made a motion for a nonsuit upon numerous grounds, which motion was overruled and the case submitted to the jury, a verdict was rendered in favor of respondent and judgment entered thereon. This is an appeal from the judgment thus entered.

It is urged that the court erred in denying Neitzel's motion for a nonsuit. Under this assignment of error we think may be properly determined whether in this action the respondent here, the plaintiff below, affirmatively shows that there was a want of probable cause, in the absence of which, malice being present, this action may be maintained. (*Crescent City Livestock etc. Co. v. Butchers' Union, etc. Co.*, 120 U. S. 141, 7 Sup. Ct. 472, 30 L. ed. 614; *Harkrader v. Moore*, 44 Cal. 144;

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Gonzales v. Cobliner, 68 Cal. 151, 8 Pac. 697; and other cases cited in note, 4 L. R. A. 259.)

If we understand counsel's contention correctly, they insist that the respondent was charged in the probate court with the infringement of the provisions of the second paragraph of sec. 7146, Rev. Codes, or, in other words, that the respondent was charged with "disturbing" a headgate, which was "regulated by the duly authorized agent of the Murphy Land & Irrigation Company, Limited, . . . and used and to be used for the measurement of water." Of the commission of this offense he was, by the committing magistrate, discharged, which being true, there existed *prima facie* evidence of want of probable cause. The fact that the respondent was discharged by the committing magistrate, however, is not conclusive so far as the question of probable cause is concerned—that is to say, if it appears affirmatively from the facts introduced upon the trial that he was in truth and in fact guilty of an indictable misdemeanor, although under a different statute, even though Neitzel acted with malice, still there would not be an absence of probable cause. The fact that the respondent was not charged under the proper statute with the commission of a criminal offense would furnish no evidence of bad faith in Neitzel if he believed, and had reason to believe, the respondent guilty of a crime, and such belief was based upon personal knowledge, or information received from others upon which he honestly and in good faith relied.

Probable cause has been defined as "the existence of such facts or circumstances as would excite the belief of a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted." It must be conceded that the proof conclusively shows that Welch communicated with Neitzel over the telephone, and informed him of the fact that the respondent went upon the dam, broke the lock, interfered with the headgate, and discharged a large flow of the water out of the reservoir into Sinker Creek, and was holding possession of the works. We think the record clearly shows Neitzel to have been in possession of knowledge of the exist-

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ence of such facts and circumstances as would excite the belief in a reasonable mind that the respondent had committed a crime, although the exact nature thereof, or the particular statute under which the prosecution would lie, may not have been known to him.

An examination of the record discloses the fact that the respondent, in relating the incidents of the dispute between himself and Welch, testified that he went upon the dam and found the headgate locked with a padlock and that he broke the lock with a big iron bar; this testimony is as follows:

“Q. How did you break that lock? What did you use?

“A. A big bar of iron, put it inside the chain and lock and pried it open.

“Q. A padlock?

“A. Yes, a padlock and chain around the standard of the wheel, I broke that and opened the headgate and let the water down the creek. . . . ”

The query therefore arises: Did the respondent by breaking the lock of the headgate commit a crime? As the case stood at the time the motion for a nonsuit was made, it had been clearly established by the undisputed facts in evidence on the part of the respondent, that the headgate, which had been damaged and interfered with by the respondent, was appurtenant to the dam used by the Water Company for the purpose of storing water and distributing the same to the water users under its canal system, for a beneficial use. Clearly, the act of the respondent in breaking the padlock and interfering with the headgate was a violation of sec. 7145, Rev. Codes, which provides: “Any person or persons who shall cut, break, damage, or in any way interfere with any ditch, canal, headgate, or any other works in or appurtenant thereto, the property of another person, corporation, or association of persons, and whereby water is conducted to any place for beneficial use or purposes, and when said canal, headgate, ditch, dam, or appurtenances are being used or are to be used for said conduct of water, shall be guilty of an indictable misdemeanor.” Not only did Neitzel have reason to believe that the respondent had committed a misdemeanor, but a misde-

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meanor had actually been committed by the respondent. This being true, Neitzel could not be held to answer in damages, even though through mistake the respondent may not have been charged in the criminal complaint under the proper section of the statute. Respondent's violation of the above section is not only shown by his own admissions, but is abundantly proven by all the facts and circumstances appearing upon the trial of this case. While it may be conceded that respondent was charged under sec. 7146, Rev. Codes, when he should have been charged under sec. 7145, Rev. Codes, nevertheless the fact that the county attorney prosecuted the respondent under the statute which failed to technically describe and identify the offense that he had committed, does not rebut the fact that a crime had been committed. It affirmatively appearing that the respondent was guilty of a criminal offense, he cannot successfully maintain this action for malicious prosecution. (*Adams v. Lisher*, 3 Blackf. (Ind.) 241, 25 Am. Dec. 102; *Threefoot v. Nuckols*, 68 Miss. 116, 8 So. 335; *Parkhurst v. Masteller*, 57 Iowa, 474, 10 N. W. 864; and other cases cited in 26 Cyc. 26, note No. 63.) As stated in the case of *Sears v. Hathaway*, 12 Cal. 277:

"A party who stands before a jury in such a case as this, on pure technical law, for a defense against an act of moral turpitude, and claiming a discharge because his prosecutor has not pursued a statutory mode of proof to convict him of a crime punishable by the statute, may congratulate himself that the precautions of the law have availed him to escape its merited penalty; but he certainly ought not to have, in addition to this immunity, a right to claim a small fortune from his victim for having mistaken the remedy, or not been as well versed as himself in the technicalities which sometimes shield guilt from public justice."

See, also, *McNulty v. Walker*, 64 Miss. 198, 1 So. 55; *Ruffner v. Hooks*, 2 Pa. Super. Ct. 278; *Lancaster v. McKay*, 103 Ky. 616, 45 S. W. 887; *Newton v. Weaver*, 13 R. I. 616.

There are numerous errors assigned by appellant other than the one herein discussed, which we think are in the main meritorious, but in view of the fact that it is so patent from

Points Decided.

the undisputed facts in evidence that Neitzel did not procure respondent's arrest or maintain his prosecution without probable cause, we have confined our discussion chiefly to this one assignment. It clearly appears from the evidence in the record that the respondent, conceding the idea which may or may not have been a fact, that he was entitled to a greater flow of water to be used upon the Joyce ranch than he was receiving, assumed the right to take the law into his own hands and go upon the works of the Water Company and with force and such violence as was necessary break the lock of the headgate, remove the chain, and proceed, in total disregard of the rights of others, to help himself to such water as he thought he was entitled to. Whether he was entitled to this water or how much he was entitled to, so far as this action is concerned is immaterial. The relative priorities of water claimants upon this stream could not be determined in this manner, but could only have been determined in the manner provided by law.

The action of the district court in denying Neitzel's motion for nonsuit is reversed and the cause remanded, with instructions to the trial court to sustain the motion and dismiss the case. Costs awarded appellant.

Morgan and Rice, JJ., concur.

(January 27, 1917.)

WILLIAM H. KERNEY and CLARA KERNEY, His Wife,
Respondents, v. **EDITH S. HATFIELD, Administratrix**
of the Estate of **WILLIAM J. HATFIELD, Deceased,**
Appellant.

[162 Pac. 1077.]

PLEADING AND PRACTICE—DEFAULT—POSTPONEMENT—TERMS.

1. When a defendant has a pleading on file which tenders an issue of law or fact, although filed out of time, but before motion for default, and when he is in court and ready for trial, it is error

Argument for Respondents.

to enter a default against him and to order that it become absolute unless he pay to plaintiff a sum of money by way of terms.

[As to right to enter default after pleading is filed out of time, see note in *Ann. Cas.* 1915C, 738.]

APPEAL from the District Court of the Fourth Judicial District, for Minidoka County. Hon. Wm. A. Babcock, Judge.

Order overruling a motion to vacate a default and set aside a judgment. *Reversed.*

Hyatt & Redford, E. R. Dampier, S. H. Hays and P. B. Carter, for Appellants.

"There can be no judgment by default where there is on file an answer or other pleading of the defendant raising an issue of law or fact." (*Crossan v. Cooper*, 41 Okl. 281, 137 Pac. 354; *Freeborn v. Chewelah Copper King Min. Co.*, 89 Wash. 519, 154 Pac. 1095.)

A default for failure to plead cannot be entered where the pleading, though out of time, is on file at the time the default is sought to be entered. (*Bertagnolli Bros. v. Bertagnolli*, 23 Wyo. 228, 148 Pac. 374; *Reher v. Reed*, 166 Cal. 525, Ann. Cas. 1915C, 737, 137 Pac. 263; *Tregambo v. Comanche Mill. & Min. Co.*, 57 Cal. 501; *Lunnun v. Morris*, 7 Cal. App. 710, 95 Pac. 907; *Pett v. Clark*, 5 Wis. 198; 6 Ency. Pl. & Pr. 82, 85; 31 Cyc. 134; 23 Cyc. 750; *Eklund v. B. R. Lewis Lumber Co.*, 13 Ida. 581, 92 Pac. 532.)

"In determining the question of discretion, the power of the court should be freely and liberally exercised under the statute to mold and direct its proceedings so as to dispose of cases upon their substantial merits." (*Pittock's Estate, In re*, 15 Ida. 47 (52), 96 Pac. 212; *Hamilton v. Hamilton*, 21 Ida. 672, 123 Pac. 630.)

Longley & Walters, Taylor Cummins and H. C. Mills, for Respondents.

Sec. 4220, Rev. Codes, provides: "All pleadings subsequent to the complaint must be filed with the Clerk and copies thereof served upon the adverse party or his attorney."

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Sec. 465, California Code of Civil Procedure, is identical with the Idaho statute, and the California court, in construing this statute in the case of *Fletcher v. Maginnis*, 136 Cal. 362, 68 Pac. 1015, says: "This statute is mandatory, by its terms, and a pleading prepared for the purpose of filing is not a pleading in fact until it is in fact filed and made a part of the record of the case as provided by the statute. Notwithstanding the service, if it had not been filed, as directed by the statute within the time allowed to answer, it would have been the duty of the clerk upon the application of the plaintiff to enter the default of the defendant."

MORGAN, J.—On July 18, 1914, the above-named respondents filed their complaint in the district court whereby they sought to recover from Edith S. Hatfield, as administratrix of the estate of William J. Hatfield, deceased, the sum of \$3,370.84, together with interest thereon, for labor performed and services rendered for deceased during his lifetime and at his instance and request, between March 15, 1911, and June 14, 1913. On July 23, 1914, appellant filed a demurrer to the complaint and the record fails to disclose what action if any, was taken upon it. However, the record in a companion case, wherein these respondents were plaintiffs and appellant, in her individual capacity, was defendant, shows that the demurrer interposed in that case was overruled by an order signed on November 21st and filed on November 25th and appellant was given until November 25th in which to answer. Respondents' counsel ask us to indulge the presumption that a like order was made in this case and cite for our consideration *Smith v. Clyne*, 16 Ida. 466, 101 Pac. 819, *Guthrie v. Phelan*, 2 Ida. 95, 6 Pac. 107, and *United States v. Alexander*, 2 Ida. 386, 17 Pac. 746. In view of the conclusion we have reached this point does not appear to be material and will not be decided, but we will proceed upon the theory that the demurrer was overruled on the same date, and that the same time was given within which to answer in this case as in the other.

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On November 23, 1914, appellant moved for a continuance, and in support thereof filed affidavits showing that she was at that time in Portland, Oregon, where she was convalescing from a surgical operation which had been performed upon her there on November 10th, and that she would not be able, with safety to her health, to attend the trial at Rupert, Idaho, at the term of court next thereafter. Certain affidavits were filed by respondents in opposition to the motion and it was denied.

On December 3, 1914, appellant's answer was filed, in which she traversed the allegations of the complaint and denied the indebtedness, and on the next day counsel for respondents, in open court, moved for a default upon the ground that the answer had not been filed within the time theretofore fixed by order of the court. Although appellant was in court with her counsel and was ready for trial, Hon. Chas. O. Stockslager, the presiding judge, made the following order:

"The above-entitled matter coming regularly on to be heard upon motion of the plaintiffs for default for the reason that no answer has been filed as by law required or within the time fixed by the court and the defendant being present in court, objecting to the granting of said motion for default and it appearing to the court that upon the answer being proper and issues joined upon the day and at the time said cause was set down for hearing that the plaintiffs in said action are not able to proceed with the trial of said cause, for the reason that such answers were not filed as by law required or served upon the attorneys for plaintiffs, prior to the time said cause was called for hearing.

"IT IS THEREFORE ORDERED that said motion for default will be sustained and judgment for default entered in the above-entitled matter unless the defendant within ten days hereafter shall pay to the said plaintiffs, their expenses and all thereof incurred in attending upon said court as well as a reasonable attorney's fee, to be taxed in the sum of Fifty Dollars, also including witness fees and sheriff's costs as per the attached memorandum, and in case such amounts be paid said case shall stand continued until the next regular or special term

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of said court, and the said answer so proffered by the defendant may be filed in said cause."

It further appears that, subsequent to the entry of this order, counsel for appellant procured the consent of Judge Stockslager to deliver to the clerk of the district court his client's check for the amount of money therein required to be paid, to be by him held pending the final determination of the case, in lieu of the payment of money thereby directed to be made, and that before the check could be procured and deposited Hon. Edward A. Walters, one of the judges of the fourth judicial district, on December 19, 1914, entered an order making the default absolute.

Thereafter and on March 8, 1915, proof was made in support of the complaint and judgment was thereupon entered in favor of respondents. Appellant moved to vacate the default and set aside the judgment. The court entered an order overruling the motion. This appeal is from that order.

The record fails to show that the answer was served upon respondents or their counsel, and it is insisted that until it had been both filed and served appellant was in default. Proceeding upon the theory that the demurrer in this case was overruled by an order signed on November 21st, and filed on November 25th, in which appellant was given until the last-named date to answer and bearing in mind that she was, at that time, in Portland, Oregon, too ill to travel and that her attorney was in Rupert, Idaho, and giving due consideration to the showing made that it was necessary for him to confer with her in order to formulate the answer; that she reached Rupert, in response to an urgent telegram from him, on December 3d, and that the answer was prepared and filed immediately after her arrival; also that it was impossible to serve it upon respondents' attorney, who resided in Twin Falls, prior to his departure from that city to attend court in Rupert on December 4th, it appears to us that counsel for appellant acted as promptly as the circumstances of the case would permit after the order fixing the time to answer was made. However, we do not believe the service, or lack of service, is decisive of the principal question here presented,

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which is: May a default be entered against a defendant who has appeared and filed an answer after the expiration of the term fixed by law or granted by the court for answering without first disposing of the issue thereby presented?

The rule is stated as follows in vol. 6, Enc. Pl. & Pr., p. 84: "And where a pleading is served only upon the plaintiff and not filed, or filed only, a judgment by default cannot be taken ignoring it.

"And even although the pleading is filed out of time the rule obtains, unless defendant's default was entered prior to the filing of the answer or plea."

It is said in 23 Cyc., p. 750: "When an answer or other pleading of a defendant, raising an issue of law or fact, is properly on file in the case, no judgment by default can be entered against him; to authorize a default, the answer or other pleading must be disposed of by a motion, demurrer, or in some other manner." (See, also, *Pett v. Clark*, 5 Wis. 198; *Tregambo v. Comanche Mill. & Min. Co.*, 57 Cal. 501; *Lunnun v. Morris*, 7 Cal. App. 710, 95 Pac. 907; *Reher v. Reed*, 166 Cal. 525, Ann. Cas. 1915C, 737, 137 Pac. 263; *Crossan v. Cooper*, 41 Okl. 281, 137 Pac. 354; *Bertagnolli Bros. v. Bertagnolli*, 23 Wyo. 228, 148 Pac. 374; *Freeborn v. Chewelah Copper King Min. Co.*, 89 Wash. 519, 154 Pac. 1095; *Oklahoma State Bank v. Buzzard* (Okl.), 160 Pac. 462.)

The action of the trial court in making the order whereby the conditional default was to become absolute unless appellant, within ten days thereafter, should pay to respondents their expenses incurred in attending upon the court, together with \$50 attorney's fees and costs, appears to have been based upon an oral statement made by counsel for respondents to the effect that he could not safely go to trial upon so short a notice of the issues presented by the answer. It seems to be likely the learned trial judge, in imposing terms upon appellant, had in mind sec. 4908, Rev. Codes, providing: "When an application is made to a court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed, in the discretion of the court or referee, as a condition of granting the same." However, that statutory pro-

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vision could not properly have been invoked in this case against appellant for her application for a postponement had been denied and she was ready for trial. Furthermore, no showing by way of affidavit, or otherwise than by oral statement of counsel, was required of respondents and even though the case was a proper one for postponement, the provisions of sec. 4372, Rev. Codes, should have been observed, which are: "A motion to postpone a trial on the ground of the absence of evidence can only be made upon affidavit showing the materiality of the evidence expected to be obtained and that due diligence has been used to procure it. The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed."

It was error for the trial court to enter the default complained of while the answer was on file and to order that such default would become absolute for failure upon appellant's part to pay to respondents their expenses, attorney's fees and costs. The order making the default absolute was also erroneous and the judgment subsequently entered cannot be sustained.

The order appealed from is reversed and the case remanded, with direction to the district court to try the issues framed by the complaint and answer. Costs are awarded to appellant.

Budge, C. J., and Rice, J., concur.

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(January 27, 1917.)

WILLIAM H. KERNEY and CLARA KERNEY, His Wife,
Respondents, v. EDITH S. HATFIELD, Appellant.

[162 Pac. 1079.]

APPEAL from the District Court of the Fourth Judicial District, for Minidoka County. Hon. Wm. A. Babcock, Judge.

Order overruling a motion to vacate a default and set aside a judgment. *Reversed.*

Hyatt & Redford, E. R. Dampier, S. H. Hays and P. B. Carter, for Appellant.

Longley & Walters, Taylor Cummins and Homer C. Mills, for Respondents.

Counsel rely on briefs filed in *Kerney et ux. v. Hatfield*, ante, p. 90, 162 Pac. 1077.

MORGAN, J.—In this case respondents seek to recover judgment from appellant in the sum of \$437.50 for labor performed and services rendered for her at her instance and request between June 15, 1913, and October 1st of the same year; also \$125 claimed by way of statutory penalty by reason of payment not having been made when due and demanded.

This is a companion case to *Kerney et ux. v. Hatfield*, ante, p. 90, 162 Pac. 1077. The same proceedings were had in both cases, except that in this the record shows the demurrer was overruled and the time for answer was fixed, while in the other it is silent upon that point.

Upon authority of *Kerney et ux. v. Hatfield*, supra, the order overruling the motion to vacate the default and set aside the judgment in this case is reversed, with direction to

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the district court to try the issues framed by the complaint and answer.

Costs are awarded to appellant.

Budge, C. J., and Rice, J., concur.

(January 27, 1917.)

HENRY C. CLARK, Plaintiff, v. FRED C. WONNACOTT,
Defendant.

[162 Pac. 1074.]

**STATUTORY CONSTRUCTION—PUBLIC OFFICER—TERM OF OFFICE—VACANCY
—HOLDING OVER—DEATH OF ONE ELECTED TO OFFICE BEFORE
QUALIFICATION.**

1. Sec. 6 of art. 18 of the constitution, prescribing that the legislature shall provide for the election biennially, in each of the several counties of the state, of a county assessor, merely provides for the biennial election of such officer, leaving it to the legislature to prescribe when such election shall be held and when the term of office shall commence and end.

2. Sec. 32a, Rev. Codes, providing that every officer elected for a fixed term shall hold office until his successor is elected and qualified is not in conflict with sec. 6, art. 18, of the constitution, providing for the biennial election of a county assessor.

3. Under sec. 32a, Rev. Codes, an incumbent of a public office is entitled to hold such office until his successor is not only duly elected, but also until he has legally qualified for such office.

4. The death of a person elected to an office before he qualifies therefor does not create a vacancy within the purview of sec. 317, Rev. Codes, since sec. 32a, Rev. Codes, provides that every officer elected for a fixed term shall hold office until his successor is elected and qualified.

5. Under the provisions of secs. 32a and 317, Rev. Codes, a vacancy in a public office exists only in the event that there is no person lawfully authorized to exercise the duties of such office.

6. Under the law of this state the person elected to an office does not become the incumbent of such office until he actually qualifies.

7. *Held*, under the facts of this case no vacancy existed in the

Argument for Defendant.

office of county assessor of Kootenai county on the second Monday of January, 1917, which the board of county commissioners of said county were authorized to fill by the appointment of plaintiff.

[As to right of incumbent of public office to retain office where successor elected or appointed is ineligible, see note in *Ann. Cas.* 1913B, 677.]

APPLICATION for writ of mandate. Denied.

C. H. Potts and Bert A. Reed, for Plaintiff.

Sec. 317, Rev. Codes, with only slight differences in phraseology, was contained in the Revised Statutes of 1887. The original enactment is an exact counterpart of the California statute on this subject, and prior to its adoption was construed by the supreme court of California in *People v. Taylor*, 57 Cal. 620; *Adams v. Doyle*, 139 Cal. 678, 73 Pac. 582; *People v. Nye*, 9 Cal. App. 148, 98 Pac. 241; *Campbell v. Board of Supervisors*, 7 Cal. App. 155, 93 Pac. 1061.

A vacancy existed under the general provisions of law and public policy. (*State v. Hopkins*, 10 Ohio St. 509; *State v. Dahl*, 55 Ohio St. 195, 45 N. E. 56; *People v. Marsh*, 30 Cal. App. 424, 159 Pac. 191.)

"A vacancy in an elective office to be filled by appointment occurs by the death of the officer-elect before the beginning of his term." (*In re Supreme Court Vacancy*, 4 S. D. 532, 57 N. W. 495.)

"If a person elected to a county office is not qualified to hold and enter into the same at the time fixed by law therefor, the office is vacant and may be filled by appointment." (*People v. Curtis*, 1 Ida. 753; *Maddox v. York*, 21 Tex. Civ. App. 622, 54 S. W. 24; *Olmstead v. Augustus*, 112 Ky. 365, 65 S. W. 817.)

McFarland & McFarland and Fred D. Crane, for Defendant.

"A vacancy in the office is not deemed to occur as the result of the death of one elected to office before the beginning of the new term, where the deceased has not qualified and where the term of the incumbent is until his successor has qualified."

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(29 Cyc. 1401; *State v. Benedict*, 15 Minn. 198; *State v. Dahl*, 55 Ohio St. 195, 45 N. E. 56; *People v. Tilton*, 37 Cal. 614; *People v. Rodgers*, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668; *State v. Elliott*, 13 Utah, 471, 45 Pac. 346; *People v. Edwards*, 93 Cal. 153, 28 Pac. 831.)

“The right of an officer to hold office until his successor is elected and qualified is as much a part of his estate in the office as the original term for which he was elected.” (*People v. Green*, 1 Ida. 235.)

In the case at bar there is no vacancy because, on the death of W. B. McFarland, there was a person lawfully authorized to assume and exercise, at that time, the duties of the office, namely, Wonnacott, the then incumbent. (*State v. Metcalfe*, 80 Ohio St. 244, 88 N. E. 738.)

There can be no appointment unless there is a vacancy. (*State v. Malone*, 131 Tenn. 149, 174 S. W. 257; *State v. Osborne*, 14 Ariz. 185, 125 Pac. 884, 891; *People v. Whitman*, 10 Cal. 38; *State v. Harrison*, 113 Ind. 434, 3 Am. St. 663, 16 N. E. 384.)

T. A. Walters, Atty. Genl., and A. C. Hindman and J. Ward Arney, Assts., as *Amici Curiae*.

The North Dakota court has construed constitutional and statutory provisions of that state similar to those found in sec. 6, of art. 18, of our constitution, and sec. 32a, Rev. Codes, holding that the incumbent continued in office until his successor was elected and qualified. (*Jenness v. Clark*, 21 N. D. 150, Ann. Cas. 1913B, 675, 129 N. W. 357.)

The occurrence of a vacancy depends upon something happening to the “incumbent.” (*Ballantyne v. Bower*, 17 Wyo. 356, 17 Ann. Cas. 82, 99 Pac. 869.)

BUDGE, C. J.—This is an original proceeding to procure the issuance of a peremptory writ of mandate, requiring the defendant to admit the plaintiff to the use and enjoyment of the office of assessor of Kootenai county and to deliver over to his possession all the records, books and papers belonging to the office of the county assessor of said county.

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The facts in this case are stipulated by counsel for the respective parties and, omitting the formal parts, are as follows:

1. "That at the general election held in the County of Kootenai, State of Idaho, on the 5th day of November, A. D., 1914, the defendant was duly elected county assessor of, in and for the county of Kootenai, State of Idaho, that thereafter at the time required by law, to wit: on the second Monday of January, 1915, he made and filed his official oath and gave the bond required by law and duly qualified to enter upon and did enter upon the duties of his said office, and that since said time he has continued to perform the duties of said office."

2. "That at the general election held in said Kootenai County, Idaho, on the 7th day of November, A. D. 1916, one William B. McFarland was duly elected to the office of county assessor of said Kootenai County for the term of two years, commencing on the second Monday of January, 1917; that after the election of said William B. McFarland, as aforesaid, and prior to the second Monday of January, 1917, to-wit: on the 25th day of November, A. D. 1916, the said William B. McFarland died; that at the time of his death he had not qualified as such Assessor of Kootenai County, State of Idaho, and had not made or filed his official oath or given the bond required by law."

3. ". . . . On the 8th day of January, 1917, at a regular meeting of the Board of County Commissioners of Kootenai County, State of Idaho, the said Board of County Commissioners made and entered an order declaring that the office of county assessor of said county was vacant because of the death of said William B. McFarland; that thereupon the said Board of County Commissioners appointed the plaintiff county assessor of Kootenai County, for the term commencing on the second Monday of January, 1917; that said appointment was made in writing and filed with the County Auditor of said county."

4. "That the plaintiff on the 8th day of January, 1917, duly executed and filed his official oath as such assessor,

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and gave the bond required by law, which bond was duly approved by the said Board of County Commissioners and filed; that the plaintiff thereupon demanded the possession of said office of county assessor from the defendant, together with the records, books and papers thereof, and the defendant refused to surrender possession of the said office of assessor, or any of the records, books or papers of said office."

The question therefore involved is, did a vacancy exist in the office of assessor of Kootenai county, on the second Monday of January, A. D. 1917? We do not think it necessary to enter upon a discussion of the conflicting decisions in arriving at a determination of this question; it will be conceded that the authorities are not uniform. A correct solution of this question depends upon a proper construction of the provisions of our constitution and statutes.

Sec. 6, art. 18, of the constitution provides, *inter alia*:

"The legislature . . . shall provide for the election biennially in each of the several counties of the state, . . . a county assessor, . . ."

Sec. 32a, Rev. Codes, provides:

"Every officer elected . . . for a fixed term shall hold office until his successor is elected . . . and qualified, . . ."

The constitutional provision above cited provides for the election in the several counties of the state of a county assessor each biennium, while the statutory provision provides that every officer elected for a fixed term shall hold office until his successor is elected and qualified. Are these two provisions in conflict, and the statutory provision accordingly unconstitutional and void? We think not.

The constitution of North Dakota contains a provision similar to the one we now have under consideration, and is as follows:

Sec. 150. "A superintendent of schools for each county shall be elected every two years, . . ."

Sec. 764, Rev. Codes, of the latter state is also very similar to the Idaho statute above quoted, and is as follows:

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“There shall be elected in each organized county, . . . a county superintendent of schools, whose term of office shall be two years, commencing on the first Monday in January following his election, and until his successor is elected and qualified.”

The supreme court, in discussing the question of whether the statutory provision above quoted was in conflict with the constitutional provision, for the reason that the latter provision provided for the election of certain officers at each biennial election, and the statute provided that the officer elected should hold his office until his successor is elected and qualified, and as in the instant case it was contended that since under the constitution the county assessor must be elected at each biennial election, therefore the duration of the term is definitely fixed by the constitution and his term of office would expire at the expiration of the two years; and that the statute, which provided that he should hold his office until his successor was elected and qualified, was in conflict with the constitution and therefore void, in the case of *Jenness v. Clark*, 21 N. D. 150, Ann. Cas. 1913B, 675, 129 N. W. 357, says:

“We do not construe sec. 150 as evidencing any intent on the part of the framers of the constitution to do more than merely provide for the biennial election of such officer, leaving it to the legislature to provide when such election shall be held and when the term shall commence and end. There is nothing therein contained from which it can be legitimately argued that it was the intention to deprive the legislature of the power to provide against vacancies in such office.”

In support of this decision the court cites the case of *State v. Fabrick*, 16 N. D. 94, 112 N. W. 74, where, in discussing sec. 764, Rev. Codes, 1905 [sec. 638, Rev. Codes, 1899], the court says:

“Under this provision of the statute it appears clear that it provides, not simply for a term of two years, but for two years and any additional time which may elapse before a successor is elected and qualified. The duly elected and qualified superintendent, after the expiration of the two years from his entering upon the duties of the office, unless a suc-

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cessor was duly elected and qualified, was entitled to occupy the office and perform its duties with precisely the same force and effect as though he himself had received the new certificate of election and qualified anew. That this is the law is well established by a vast number of authorities. Under a statute like ours, holding over pending the election and qualification of a successor is as much a part of the term of office to which the superintendent is elected as are the first two years, where he continues in office. [Citing numerous cases.] Unquestionably this statute was enacted with a view to preventing the office of superintendent of schools from becoming vacant during any part of the time, and unquestionably it means just what it says—in effect that one, once lawfully elected and qualified, continues to hold the office until his successor is elected and qualified.”

We have therefore reached the conclusion that sec. 32a, Rev. Codes, is not in conflict with sec. 6, art. 18, of the constitution, and, therefore, not unconstitutional and void. The constitution merely provides for the biennial election of county officers, and it is left entirely to the legislature to provide the time of holding such elections and when the term shall commence and end, and unless there was a vacancy in the office of county assessor, under the provisions of sec. 317, Rev. Codes, or unless a proper construction of sec. 32a, Rev. Codes, provides for the appointment, there can be no question of the right of the defendant in this action to continue to hold the office of county assessor of Kootenai county, until his successor is elected and qualified.

How should the phrase “or appointed” as it appears in sec. 32a, Rev. Codes, be construed? There can be no appointment unless there is a vacancy; there can be no vacancy where there is an incumbent. A vacancy exists where there is no person lawfully authorized to assume and exercise at present the duties of the office. The constitution provides for the election biennially of these officers, and the legislature fixes their terms—that is to say, the legislature fixes the time when their terms begin and end and when a vacancy occurs. It necessarily follows that if an officer under the law is entitled

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to hold his office until his successor is elected and qualified, that the election of the officer does not create a vacancy, but it requires his election and qualification coupled with the expiration of his predecessor's term to create a vacancy. Clearly, there must be a vacancy under the provisions of sec. 317, Rev. Codes, before the office can be filled by appointment; in other words, had Mr. McFarland qualified before his death and after the expiration of his predecessor's term, his death then would have created a vacancy within the meaning of this section.

Counsel for plaintiff contends that there was a vacancy in the said office on the second Monday of January, 1917, for two reasons: First, under the express provisions of sec. 317, Rev. Codes, which in part is as follows:

“Every civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such office, as follows:

“6. A failure to elect at the proper election, there being no incumbent to continue in office until his successor is elected and qualified, nor other provision relating thereto.”

Second, under the general provisions of law and public policy. We will dispose of these propositions in the order in which they are stated.

In the instant case it is admitted that there was not a failure to elect a successor to the defendant at the proper election; it must also be conceded that there was an incumbent to continue in office until his successor was elected and qualified. Had Mr. McFarland lived and failed to qualify, there would have been no vacancy, under our statutes, because there was an incumbent to continue in the office, whose right it was to hold the office until his successor was, not only duly elected, but also qualified. And since Mr. McFarland departed this life before he had qualified and before the expiration of his predecessor's term, by no process of reasoning is it possible to consider him an incumbent of the office after his death. And in this there is a distinction between the statutes of California and this state. Sec. 996, Kerr's Pol. Code of Cali-

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fornia, providing for vacancies and how they may occur, is in part as follows:

“An office becomes vacant on the happening of either of the following events before the expiration of the term:

“9. His refusal or neglect to file his official oath or bond within the time prescribed.”

A provision similar to subd. 9 of the California code above quoted was in force in this state, sec. 431, subd. 9, Revised Statutes, 1887, but was repealed by the Sess. Laws 1899, p. 67. Under our present statute, providing for vacancies in office and how they may occur, it is not necessary, in order to avoid a vacancy in office, that the person elected to the office qualify upon the day fixed for the commencement of the term of his office, but he may qualify at any time during the term for which he was elected. While under the code and the decisions of the supreme court of California one duly elected to an office is the incumbent whether he qualifies or not, but unless he qualifies upon the day fixed by law for the commencement of his term a vacancy will be incurred. In the case of *People v. Taylor*, 57 Cal. 620, the court says:

“ . . . this provision of the code [Pol. Code, sec. 996] regards the person duly elected to an office as the incumbent of that office from the time of the commencement of the term for which he was elected until the expiration thereof, whether he qualifies or not.”

In other words, the person duly elected to an office becomes the incumbent of that office from the time of the commencement of the term. While under our statutes the person elected to an office does not become the incumbent of the office until he qualifies. To the same effect as *People v. Taylor*, *supra*, are the cases of *Adams v. Doyle*, 139 Cal. 678, 73 Pac. 582; *People v. Nye*, 9 Cal. App. 148, 98 Pac. 241. Therefore, the cases from California, cited by counsel, being under a statute not in our code, have no application to the case at bar.

In the case of *People v. Green*, 1 Ida. 235, it appears that Green was elected in 1865 to the office of county treasurer; one Glidden claimed to have been elected to the same office in

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1867. The latter was asking possession of the office, asserting that Green held it without any legal right, warrant or authority whatever. During the proceedings one Logan was permitted by the trial court to intervene, and in his petition alleged that he was elected to said office in 1866. Glidden dismissed his action, and upon appeal to this court the question of the right to hold the office of county treasurer was contested by Green and Logan. The court, after deciding that Logan could not intervene, proceeded to discuss his petition, and said:

“But admitting the right of Logan to intervene, does his petition in intervention show a cause of action? Green, it is alleged, wrongfully withholds the office since January, 1867, but the petition directly avers that the intervenor has failed to qualify, although claiming by an election in 1866, to hold the office for two years from January, 1867. Now, section 107, page 499, Laws of Idaho, First Session, says: ‘The county treasurer shall hold his office for the term of two years, and until his successor is chosen and qualified.’ The right to hold until his successor is elected and qualified is as much a part of the estate in the office as the original term of two years. [Citing cases.] Now, before Logan can show his right to the office, admitting his claim to be valid, he must procure the ouster of Green; before Green can be ousted, it must be shown that he wrongfully holds; to show this it must be proved not only that his successor has been elected, but that he has duly qualified—not only that [he] is entitled to the office, but that he is qualified to enter into the possession the moment of the defendant’s ouster therefrom. The intervenor does not show himself in that condition, and the petition is in this respect fatally defective.”

This decision was rendered before the amendment of the 1887 statutes by the Session Laws of 1899, and we do not think that it supports plaintiff’s theory of the case.

In *People v. Curtis*, 1 Ida. 753, upon which case the plaintiff relies, the facts, in so far as the case at bar is concerned, are substantially as follows: The defendant was probate judge-elect of Ada county, but was held to be unqualified to hold the

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office because he had been a member of the preceding legislature, which had increased the salary of the probate judge of Ada county; the court said:

“If, therefore, the defendant was not qualified to enter upon the duties of the office of probate judge of said county, on the first Monday of January, 1879, the said office would become vacant, and the vacancy might be filled in accordance with the provisions of section 45 of the last-mentioned act, and the office to be again filled at the next general election as provided by law.”

It will be seen that the vacancy was occasioned in the latter case by reason of the fact that Curtis was ineligible, and, therefore, could not legally qualify within the time prescribed by law. Since, however, the provision of the statute, creating a vacancy upon failure to qualify within the time prescribed, has been repealed, this case has no application to the one under discussion.

We find no merit in counsel's second proposition.

We have therefore concluded that no vacancy existed in the office of county assessor of Kootenai county on the second Monday of January, 1917, which the board of county commissioners were authorized to fill by appointment of the plaintiff. (*Kimberlin v. State*, 130 Ind. 120, 30 Am. St. 208, 29 N. E. 773, 14 L. R. A. 858; *Commonwealth v. Hanley*, 9 Pa. 513; *State v. Benedict*, 15 Minn. 198; *State v. Metcalfe*, 80 Ohio St. 244, 88 N. E. 738; *Ballantyne v. Bower*, 17 Wyo. 356, 17 Ann. Cas. 82, and cases cited in note, pp. 86, 87, 99 Pac. 869; *State v. Elliott*, 13 Utah, 471, Ann. Cas. 1913B, 677, note, and cases cited therein, 45 Pac. 346.) From the foregoing authorities, which in our opinion support defendant's contention, it is evident that the defendant, Fred E. Wonnacott, is entitled to hold the said office of county assessor until his successor is duly elected and qualified according to law; and that the appointment of plaintiff was ineffectual and void. Peremptory writ denied. Costs awarded to defendant.

Morgan and Rice, JJ., concur.

Argument for Respondents.

(February 6, 1917.)

W. C. THOMPSON, Appellant, v. JOHN V. HARRIS and
ANNA B. HARRIS, Husband and Wife, Respondents.

[163 Pac. 611.]

APPEAL — TIME FOR TAKING — STATUTORY PROVISIONS — STRICT COMPLIANCE.

1. Where a judgment was entered on the 3d day of December, 1913, and no appeal was taken therefrom within sixty days from the entry thereof, under the provisions of subd. 1, sec. 4807, Rev. Codes, as amended by the Sess. Laws 1911, p. 367, which was the law in force at the date of the rendition and entry of said judgment, an appeal taken from said judgment on December 1, 1914, is too late to have said judgment reviewed on appeal, this court being without jurisdiction.

2. Subd. 2, sec. 4807, Rev. Codes, as amended, *supra*, provides an appeal may be taken to the supreme court from a district court, from an order granting or refusing a new trial, within thirty days after the order is made and entered on the minutes of the court or filed with the clerk. Where an order denying a new trial was made on the 16th day of December, 1913, and no appeal was taken therefrom within thirty days from the entry thereof, the same is subject to dismissal.

APPEAL from the District Court of the Sixth Judicial District, for Bingham County. Hon. J. M. Stevens, Judge.

Action to foreclose mechanic's lien. Judgment for defendants and plaintiff appeals. *Dismissed.*

Wm. A. Beakley, for Appellant, cites no authorities.

C. S. Beebe, for Respondents.

Record on appeal must affirmatively show that appellant has complied with the law relative to appeals to give the court jurisdiction. (*Anderson v. Knott*, 1 Ida. 626.)

Where record on appeal fails to show a compliance with the statute or rules of court, appeal will be dismissed. (*Pence*

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v. Lemp, 4 Ida. 526, 43 Pac. 75; *Penny v. Nes Perce Co.*, 4 Ida. 642, 43 Pac. 570.)

BUDGE, C. J.—This is an appeal from a judgment, and from an order denying a motion for a new trial. The judgment was rendered and entered on the 3d day of December, 1913, and the motion for a new trial was denied on the 1st day of December, 1914. The notice of appeal and undertaking on appeal were both filed on the 1st day of December, 1914, the notice being served on counsel for appellant some time in December, 1914, the exact date of service not appearing thereon.

Sec. 4807, Rev. Codes, as amended by Sess. Laws 1911, p. 367, which was the law in force at the date of the rendition of the judgment in this case and the making of the order denying appellant's motion for a new trial, fixes the time within which an appeal may be taken from a final judgment in an action commenced in the court in which the same was rendered at sixty days after the entry of such judgment; and from an order granting or refusing a new trial, within thirty days after the order is made and entered on the minutes of the court or filed with the clerk.

Practically one year elapsed after the entry of the judgment before the notice or undertaking on appeal was filed with the clerk of the district court, which under the statutory provisions above cited was too late to have the judgment reviewed. (2 R. C. L. 104, and cases cited; 3 C. J. 1040, and cases cited; *Campbell v. First National Bank*, 13 Ida. 95, 88 Pac. 639; *Oliver v. Kootenai County*, 13 Ida. 281, 90 Pac. 107; *Arthur v. Mounce*, 4 Ida. 487, 42 Pac. 509; *McElroy v. Whitney*, 24 Ida. 210, 133 Pac. 118.)

The notice of intention to move for new trial was served and filed on November 26, 1913, which was eight days prior to the filing of the judgment and decision of the trial court. Both appeals must, therefore, be dismissed, from the judgment because not taken in time, and from the order denying the motion for new trial because the notice of intention to move

Points Decided.

for new trial was made and served before the judgment and decision of the trial court was entered.

The brief of counsel for respondent in this case is marred by certain statements derogatory to counsel for appellant which are wholly uncalled for, and in no way connected with anything in the record which has been brought to our attention. This court cannot countenance tactics of this sort in the presentation of cases, and it is ordered accordingly that respondents' brief be stricken from the files and that no costs be allowed for printing it. Aside from this, costs are awarded to respondents.

Morgan and Rice, JJ., concur.

(February 9, 1917.)

J. W. MANEY, JOHN MANEY, H. G. WELLS and E. J. WELLS, Copartners Doing Business Under the Firm Name and Style of MANEY BROTHERS COMPANY, Appellants, v. IDAHO CONSTRUCTION COMPANY, LIMITED, a Corporation, Respondent.

[163 Pac. 297.]

CONTRACTS — ENGINEER'S ESTIMATES — CONFLICT IN EVIDENCE — FRAUD AND MISTAKE.

1. A contract for the construction of railroad work which provides that the chief engineer shall have the right to decide all questions arising between the parties thereto relative to said work, and as to the true intent and meaning of the provisions and specifications of the contract and the specifications under which the work is to be done, and that his decision shall be binding upon all parties to the agreement, does not make the estimates of quantities made by the chief engineer binding upon the parties.

2. A contract for the construction of railroad work which provides that the subcontractor shall be paid as per chief engineer's estimate sheet does not make the estimates of the chief engineer final and conclusive upon the parties to the contract.

Argument for Appellants.

3. In an action for the amount due for the construction of a railroad roadbed under a contract which does not make the estimates furnished by the chief engineer final and conclusive upon the parties, it is proper for the trial court to receive competent evidence to disclose the errors and mistakes of such estimates, if any there be. Such evidence is admissible without reference to the question of fraud or bad faith on the part of the engineer.

4. Where the evidence is conflicting and sufficient, the verdict of the jury will not be disturbed.

[As to effect of architects' certificates and engineers' estimates when provided for in contract, see note in 56 Am. St. 312.]

APPEAL from the District Court of the Seventh Judicial District, for Washington County. Hon. Ed. L. Bryan, Judge.

Action to recover on account. Judgment for defendant.
Affirmed.

V. P. Coffin and Ed. R. Coulter, for Appellants.

A provision in a building contract referring all matters in dispute to an engineer, architect or arbitrator for decision and declaring his decision thereof to be conclusive and final is valid and binding upon the parties in the absence of fraud, collusion or such gross error or mistake as would imply bad faith or failure to exercise an honest judgment on the part of the engineer. (*Martinsburg & P. R. Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. ed. 255; *Newman v. United States*, 81 Fed. 122; *Thompson v. Bradbury*, 5 Ida. 760, 51 Pac. 758; *Chicago, S. F. & C. R. Co. v. Price*, 138 U. S. 185, 11 Sup. Ct. 290, 34 L. ed. 917; *Sweet v. Morrison*, 116 N. Y. 19, 15 Am. St. 376, 22 N. E. 276; *Shriner v. Craft*, 166 Ala. 146, 139 Am. St. 19, 51 So. 884, 28 L. R. A., N. S., 450; *Young v. Stein*, 152 Mich. 310, 125 Am. St. 412, 116 N. W. 195, 17 L. R. A., N. S., 231; *Williams v. Chicago, S. F. & C. Ry. Co.*, 112 Mo. 463, 34 Am. St. 403, 20 S. W. 631; *Pope v. King*, 108 Md. 37, 15 Ann. Cas. 970, 69 Atl. 417, 16 L. R. A., N. S., 489; *Elliott v. Missouri, K. & T. R. Co.*, 21 C. C. A. 3, 74 Fed. 707; *Chicago S. F. & C. Co. v. Price*, 138 U. S. 185, 11 Sup. Ct. 290, 34 L. ed. 917.)

Argument for Respondent.

The contract may prescribe limitations and conditions as to substantive rights, but any attempt by the parties to stipulate as to the remedy is void. (*Nute v. Hamilton Mut. Ins. Co.*, 6 Gray (72 Mass.), 174, 2 Am. St. 566, note; 6 R. C. L., Contracts, sec. 160, p. 754.)

Nothing prevents parties from ascertaining and constituting as they please the cause of action which is to become the subject matter of decision by the courts. (*Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54; *Wortman v. Montana Cent. Ry. Co.*, 22 Mont. 266, 56 Pac. 316; *Thompson v. Charnock*, 8 Term Rep. 139, 101 Eng. Reprint, 1310; *Scott v. Avery*, 5 H. L. Cas. 811, 10 Eng. Reprint, 1121; *Williams v. Chicago, S. F. & C. Ry. Co.*, 112 Mo. 463, 34 Am. St. 403, 20 S. W. 631.)

Edwin Snow, Harris & Smith and J. W. Galloway, for Respondent.

In the contract under consideration, it was provided that the decision of the chief engineer should be binding upon all parties to this agreement. It has been decisively settled by this court that such a provision in a contract is nugatory and void. (*Huber v. St. Joseph's Hospital*, 11 Ida. 631, 83 Pac. 768; *McCoy v. Able*, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; *Louisville etc. Ry. Co. v. Donnegan*, 111 Ind. 179, 12 N. E. 153; *Board of Commrs. of Hamilton County v. Newlin*, 132 Ind. 27, 31 N. E. 465.)

The *ex parte* estimate of the engineer given in evidence for the first time on the trial could not be treated in any respect as an adjudication. (*Boteler v. Roy*, 40 Mo. App. 234; *McMahon v. New York etc. R. R. Co.*, 20 N. Y. 463; *Schwerin v. DeGraff*, 21 Minn. 354; *Wilson v. York etc. R. Co.*, 11 Gill & J. (Md.) 58.)

The respondent was reduced to the extremity of proving its case by the best evidence obtainable, which was right and proper. (*Spaulding v. Coeur d'Alene Ry. etc. Co.*, 5 Ida. 528, 51 Pac. 408; 5 Am. & Eng. Ency. of Law, 2d ed., 41, and cases there cited.)

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RICE, J.—In July, 1910, the appellants entered into a contract with the Pacific & Idaho Northern Ry. Co., for the construction of the roadbed of said company from Evergreen, Idaho, to New Meadows, Idaho, a distance of about fourteen miles. Shortly afterward respondent entered into a contract with the appellants whereby as subcontractor it agreed to construct about three miles of the work. The appellants in their complaint alleged that during the construction of the work they paid out money upon time checks, orders, etc., and furnished supplies, teams and men for respondent in an amount aggregating \$33,838.17, all of which was paid and furnished at the special instance and request of respondent and for which respondent promised to pay the appellants. It is admitted by appellants that the respondent was entitled to a credit for work done to the amount of \$29,918.97, and judgment for the difference between the two sums is prayed for.

The respondent in its answer admitted that its account was properly charged by the appellants with various items to an amount aggregating \$26,400, but denied that it should be charged with any greater sum. Respondent also alleged that the credits to which it was entitled for work performed under its contract with the appellants amounted to \$37,329.80, and prayed for a judgment in the sum of \$13,136.52.

The respondent further alleged in its answer that the plaintiffs fraudulently and arbitrarily, and in violation of good faith and their duty to the respondent, made or caused to be made and furnished to respondent false and untrue final estimates, so called, of the amount of work done by respondent under its said contract. Respondent also alleged that the appellants charged its account with certain spurious and fictitious items and overcharges over its protest and without its consent, and charged respondent's account with certain sums of money paid out to other parties without any authority from respondent and against its express direction, and that the sum of such spurious items and amounts paid over respondent's protest and against its consent amounted in all to \$7,238.17.

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The case was tried to a jury and judgment entered for defendant in the sum of \$2,599.43, from which judgment the plaintiffs have appealed to this court.

During the course of the trial evidence of engineers was introduced tending to show that the number of yards excavated from certain cuts by respondent was in fact materially greater than the number of yards shown by the final estimate of the engineer of the railway company.

The appellants assign as error the action of the court in permitting the respondent to introduce such evidence, for the reason that the terms of the contract between the plaintiffs and defendant provided that the measurements of the said chief engineer were final and conclusive between the parties, and, further, for the reason that the introduction of such testimony tended to contradict and vary the terms of the final estimate of the chief engineer, and that no foundation was laid for such evidence in the pleadings.

Error is also assigned for the reason that the measurements of the engineer on the part of the defendant were taken more than three years subsequent to the completion of the work, and that it appeared by the evidence that during the three years intervening large quantities of material had been removed from the cuts by the railway company.

The provisions of the contract which it is claimed make the measurements of the chief engineer of the railway company final and conclusive between the parties to this action are all contained in two paragraphs of the contract.

In the fourth paragraph is found the following: "The chief engineer shall have the right to decide all questions arising between the parties hereto relative to said work, and as to the true intent and meaning of the provisions and specifications in this contract and of the specifications under which the work is to be done, and his decision shall be binding on all parties to this agreement."

The eighth paragraph is as follows: "It is understood and agreed by and between the parties hereto that the sub-contractor shall be paid for the work performed under this contract in the following manner: Ninety per cent of amount due

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for work under this contract shall be paid on 25th of month following that in which work was done as per chief engineer's estimate sheet. The ten per cent retained monthly shall be payable immediately on payment of final estimate to Maney Bros. & Company by Pacific & Idaho Northern Ry. Company."

The foregoing provisions of the contract do not make the estimates of the chief engineer as to quantity of material moved final and conclusive upon the parties. In the absence of such an agreement his estimates do not partake of the nature of a final adjudication.

The contract in the case at bar is very similar to the contract under consideration in the case of *Illinois Central R. Co. v. Manion*, 113 Ky. 7, 101 Am. St. 345, 67 S. W. 40. In that case the contract stipulated that the engineer in charge should certify the amount done each month, and upon his certificate Manion should be paid ninety per cent of the sum earned, the remaining ten per cent to be paid on the final estimate. The court in discussing this contract said:

"It is earnestly maintained for the company that the estimates of the engineer in charge are conclusive on Manion, unless fraudulent, or so grossly erroneous as to imply fraud or a failure to exercise an honest judgment: *City of Covington v. Limerick*, 19 Ky. Law Rep. 330, 40 S. W. 254, and cases cited. The contract in this case is different from that in the Limerick case. That contract provided that the decisions of the engineer should be final and binding on both parties. There is no such provision in the contract before us. It simply provides that the amount of work performed under the contract shall be determined by the measurements and calculations of the engineer in charge. This is nothing more than a stipulation for a means of determining the amount of work, and the determination by the engineer is entitled to no more weight than a determination by the concurrent act of the two parties under a provision requiring the amount of work to be done to be settled in that way. If the engineer was guilty of fraud or made a mistake, it may be shown. Fraud or mistake is a ground for relief from a settlement made by the parties themselves, and we see no reason why

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the same rule should not apply to a settlement made for them by the servant of one of them alone, unless the contract expressly provides otherwise: 2 Wood's Railway Law, 1141; *Memphis etc. R. R. Co. v. Wilcox*, 48 Pa. St. 161; *Railway Co. v. Cummings*, 6 Ky. Law Rep. 441; *Underwood v. Brockman*, 4 Dana (34 Ky.), 309, 29 Am. Dec. 407."

In the case of *Smith v. Faris-Kesl Const. Co.*, 27 Ida. 407, 150 Pac. 25, this court quoted from the case of *Memphis etc. R. R. Co. v. Wilcox*, *supra*, in part as follows:

"In this contract, however, this stipulation for finality is wanting, and this makes a most material difference. It provides for monthly estimates, and in the end for a final estimate by the engineer, without any declaration as to conclusiveness. His estimates and acts have no quality, therefore, of an adjudication. It must depend for finality on its inherent accuracy, and to test whether it be accurate or not, it is liable to be met by any competent proof, which would disclose its errors and mistakes, if there be any."

Continuing in its opinion in the *Smith* case this court said:

"In the contract here under consideration it was not stipulated that the estimates of the engineer should be final, binding or conclusive upon the parties; therefore the allegations of fraud in the complaint were immaterial and the estimates of the engineer were subject to attack for inaccuracy, and it was proper for the trial court to consider all the evidence offered and admitted touching the amount, character and classification of material handled by respondent in the construction of the canal."

It appears to us that in regard to the matter under consideration there is no material difference between this case and the case of *Smith v. Faris-Kesl Const. Co.*, *supra*.

Under the contract neither the monthly estimates nor the final estimate were conclusive upon the defendant, and it was proper to receive any competent proof tending to show actual quantities of material handled in the excavations and fills. There was no error committed by the trial court in admitting the evidence offered.

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The remaining error complained of is that the verdict was contrary to the evidence. It is claimed that the measurements by the defendant's engineers were made three years after the excavation, that in the meantime some material had been removed from the cuts, and that for this reason the measurements were inaccurate and not entitled to be admitted in evidence. There was testimony, however, to the effect that the cuts were in substantially the same condition as when they were first excavated by the defendant. The evidence was admissible, and it was proper for the jury to consider the same in arriving at its verdict.

In addition to the variation in the amount of material handled by respondent, an issue was raised and evidence introduced as to certain supplies furnished by appellants to other parties and charged to the respondent, the appellants claiming that they were authorized to do so and the respondent denying any authorization. Also that appellants had charged several thousand dollars against the respondent for men, teams and equipment furnished by appellants and used upon the work included within respondent's subcontract. The respondent contends that all such men, equipment and teams were furnished without its request and against its protest. There was also a considerable amount of testimony received as to the reasonable value of the services of such men, teams and equipment.

It is not necessary, however, to go into a detailed calculation to determine the full extent of the variation between the claims of the plaintiff and the defendant, as it sufficiently appears that there was ample latitude in the evidence to sustain the verdict.

The evidence being properly admitted and being conflicting, the verdict of the jury will not be disturbed by this court and the judgment of the district court will be affirmed. Costs awarded to the respondent.

Budge, C. J., and Morgan, J., concur.

Argument for Appellant.

(February 10, 1917.)

J. E. CHANDLER, Respondent, v. ANDREW LITTLE,
Appellant.

[163 Pac. 299.]

**PUBLIC RANGE—REGULATION OF—POLICE POWER—DESTRUCTION OF GRASS
—MEASURE OF DAMAGE.**

1. Secs. 1217 and 1218, Rev. Codes, making it unlawful for an owner of sheep to herd them or permit them to graze within two miles of the dwelling-house of another, and providing as a penalty that the party injured may recover from such owner for damages sustained thereby, were enacted and are enforced in the exercise of the police power of the state.

2. Under the facts of this case the measure of damage is the loss respondent actually sustained as a direct result of appellant's sheep grazing off and destroying, within two miles of his dwelling-house, grass growing upon the public range which his stock would have fed upon had it not been so grazed off and destroyed.

APPEAL from the District Court of the Seventh Judicial District, for Canyon County. Hon. Ed. L. Bryan, Judge.

Action to recover penalty for the violation of sec. 1217, Rev. Codes. Judgment for plaintiff. *Affirmed.*

E. J. Frawley and Scatterday & Van Duyn, for Appellant.

In order for the plaintiff to recover, he must show the actual number of stock that would have been ranged by him upon the public range grazed or herded upon by the sheep within the two miles of his dwelling-house between the dates in which the grazing and herding was done; the reasonable value of said range to him for said pasturage between the dates aforesaid, which valuation must be shown by the testimony of competent witnesses as to the reasonable value of said range. (*Roseborough v. Whittington*, 15 Ida. 100, 103, 96 Pac. 437.)

The question of damage will be a question that is to be settled by the jury and not by the witnesses. (*McGuire v. Post Falls etc. Mfg. Co.*, 23 Ida. 608, 131 Pac. 654; *McKissick*

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v. Oregon Short Line R. Co., 13 Ida. 195, 89 Pac. 629; *Axtell v. Northern Pac. R. Co.*, 9 Ida. 392, 74 Pac. 1075; *McClain v. Lewiston etc. Racing Assn.*, 17 Ida. 63, 20 Ann. Cas. 60, 104 Pac. 1015, 25 L. R. A., N. S., 691; *Jenkins v. Commercial Nat. Bank*, 19 Ida. 290, 296, 113 Pac. 463; *Chicago, R. I. & P. R. Co. v. Teese*, 42 Okl. 188, 140 Pac. 1166, 52 L. R. A., N. S., 167; *Atchison, T. & S. F. R. Co. v. Wilkinson*, 55 Kan. 83, 39 Pac. 1043.)

Geo. F. Zimmerman and W. A. Stone, for Respondent.

“Any evidence tending to show what the grass was worth when put to any of the uses for which it was valuable should be admitted.” (*Gulf etc. Ry. Co. v. Matthews*, 3 Tex. Civ. 493, 23 S. W. 90; *People's Ice Co. v. Steamer Excelsior*, 44 Mich. 229, 38 Am. Rep. 246, 6 N. W. 636.)

“The ordinary, and in general, the only legal course is to lay such facts before the jury as have a bearing on the question of damages and leave them to fix the amount.” (*Sweet v. Ballentyne*, 8 Ida. 431, 69 Pac. 995.)

MORGAN, J.—This action was commenced by respondent to recover from appellant the penalty for the violation of sec. 1217, as provided for by sec. 1218, Rev. Codes, which sections are as follows:

“Sec. 1217. It is not lawful for any person owning or having charge of sheep to herd the same, or permit them to be herded, on the land or possessory claims of other persons, or to herd the same or permit them to graze within two miles of the dwelling house of the owner or owners of such possessory claim.

“Sec. 1218. The owner or the agents of such owner of sheep violating the provisions of the last section, on complaint of the party or parties injured before any justice of the peace for the precinct where either of the interested parties may reside, is liable to the party injured for all damages sustained; and if the trespass be repeated is liable to the party injured for the second and every subsequent offense in double the amount of damages sustained.”

Opinion of the Court—Morgan, J.

So far as they apply to the facts in this case, sec. 1217 makes it unlawful for any person owning sheep to herd or permit them to graze upon the public range within two miles of the dwelling-house of another, and sec. 1218, as a penalty for the violation of the former section, makes the owner liable to the party injured for all damages sustained as a direct result of the sheep being so herded or permitted to graze. These sections were enacted and are enforced in the exercise of the police power of the state for the preservation of the peace, quietude and safety of the inhabitants of sparsely settled districts where public range exists and where it has, heretofore, been the subject of contention between settlers and the owners of cattle and horses upon the one hand and of sheep upon the other. (*Siefers v. Johnson*, 7 Ida. 798, 97 Am. St. 271, 65 Pac. 709, 54 L. R. A. 785; *Sweet v. Ballentyne*, 8 Ida. 431, 69 Pac. 995; *Bacon v. Walker*, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. ed. 499.)

The trial resulted in a verdict for respondent in the sum of \$100 and judgment was rendered in his favor for that amount and costs. This appeal is from the judgment.

Appellant contends that the evidence is insufficient to sustain the verdict, also that the rulings of the court, as to the admissibility of evidence, were erroneous and that error was committed in giving certain instructions, and in refusing to give others, to the jury.

The record discloses that respondent is a farmer and stock-raiser, and that on and about May 24, 1913, he was the owner of 160 head of livestock, consisting of horses and cattle, which were then pasturing upon and were accustomed to range and pasture upon about 1,000 acres of public domain and other unfenced lands within a radius of two miles of his place of residence; that on the date above mentioned appellant's servants and employees brought two bands of sheep, of about 2,000 head each, upon the public range, above mentioned, and herded and permitted them to graze thereon; that one of the bands were so kept and pastured within two miles of respondent's dwelling-house for about a week and the other about half that length of time.

Opinion of the Court—Morgan, J.

There is conflict in the evidence as to the value of the public land within two miles of respondent's premises for grazing purposes, but sufficient evidence was adduced to justify the jury in concluding that on and immediately prior to the 24th day of May, 1913, it furnished good pasture for horses and cattle and that when the sheep were removed the grass was practically destroyed and the land was, for a considerable period of time thereafter, almost worthless for range purposes; that had the grass not been destroyed it would have furnished feed for respondent's stock and that his damage, by reason of its destruction, amounted to the sum found in the verdict.

Since respondent was not the owner of the grass growing upon the public domain within two miles of his residence, but had a right only in common with others to pasture his horses and cattle upon it, counsel for appellant insist that the damage recoverable should be confined to the actual injury sustained by respondent by reason of his loss of the use of the range during the time the sheep were being herded there.

The rule contended for is too narrow. Applied to the facts of this case it would mean that sufficient grass to feed 160 head of horses and cattle during the number of months might be consumed or destroyed in violation of the law and the penalty would be limited to the reasonable value of pasturage for such of them as left or were removed from the range during the week the sheep occupied it. Such a theory cannot survive when we apply to it the plain language of sec. 1218, *supra*, wherein it is said: "The owner . . . of sheep violating the provisions of the last section, . . . is liable to the party injured for all damages sustained.

So many elements may enter into claims arising under the law regulating the use of the range that we will not attempt to lay down a general rule fixing the measure of damage in all cases, but will say that, under the facts of this case, it is the loss respondent actually sustained as a direct result of appellant's sheep grazing off and destroying, within two miles of his dwelling-house, grass growing upon the public

Points Decided.

range which, in reasonable probability, his stock would have fed upon had it not been so grazed off and destroyed.

The instructions given correctly state the law applicable to the case, and we find no error in the rulings of the trial judge relative to the admissibility of evidence.

The judgment appealed from is affirmed. Costs are awarded to respondent.

Budge, C. J., and Rice, J., concur.

(February 10, 1917.)

THORAL JOHANSEN, Appellant, v. EUGENE LOONEY
and JAMES H. OAKES, Respondents.

[163 Pac. 303.]

**BASIS OF DISTINCTION BETWEEN LAW AND EQUITY ACTIONS—PLEADINGS
—DEED INTENDED AS MORTGAGE—INNOCENT PURCHASER FROM MORT-
GAGEE—RIGHT TO TRIAL BY JURY—WAIVER OF JURY TRIAL.**

1. In determining whether the nature of an action is legal or equitable the court must take into consideration the averments of plaintiff's petition or complaint and the body and substance of the ultimate relief sought.

2. Where plaintiff alleges that a deed, absolute in form, was in fact intended as a mortgage since it was given as security for a debt, and sues for an amount of money equal to the difference between his actual indebtedness to the grantee and the greater amount received by the grantee upon sale of the property to a third party, although in order to entitle him to recover this surplus he must show the conveyance to have been in fact a mortgage instead of a deed, such proof is only incidental to the real and ultimate issue presented, which is whether plaintiff is entitled to recover a money judgment.

3. The apparent purport of a written instrument may be varied by parol evidence when such instrument is vague or indefinite in its terms, or the terms contain a meaning which is not properly expressed but which was intended by the parties to be a part of the contract or transaction and binding upon them.

Argument for Appellant.

4. Where plaintiff alleges that an instrument purporting to be a deed was in fact a mortgage, and seeks to recover from the grantee the difference between his indebtedness and the amount received by the grantee on sale of the property to a third party, and joins such third party with the grantee as a defendant, in order to affect such third party with notice of the grantee's real interest in the property under such deed, it must be shown that such third party purchased with actual or constructive notice of the fact that the first deed was in fact a mortgage, given for the purpose of securing an indebtedness, and unless this is clearly shown, either by parol evidence or by attendant circumstances, the validity of the deed given by the grantee to such third party cannot be attacked.

5. *Held*, that the allegations and prayer of plaintiff's complaint in this case show him to be entitled to a trial by jury, under sec. 7, art. 1, of the constitution, and secs. 4368 and 4369, Rev. Codes, which right cannot be denied him in the absence of a waiver.

6. *Held*, that the acts and conduct of plaintiff in this case, as shown by the record, do not constitute a waiver of a jury trial.

[As to parol evidence supplementing deed by proof a collateral oral agreement, see note in *Ann. Cas.* 1914A, 455.]

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Carl A. Davis, Judge.

Action in *assumpsit* for money had and received. From a judgment for defendant, plaintiff appeals. *Reversed and remanded.*

S. L. Tipton and J. B. Eldridge, for Appellant.

The guaranty that "the right to trial by jury should remain inviolate" has no reference to equitable cases. (*Christensen v. Hollingsworth*, 6 Ida. 87, 96 Am. St. 256, 53 Pac. 211.)

The right to a jury trial may be waived by any conduct or acquiescence inconsistent with the intention or expectation to insist upon it. (24 Cyc. 154; *MacKellar v. Rogers*, 109 N. Y. 468, 17 N. E. 350; *Boyd v. Boyd*, 12 Misc. Rep. 119, 33 N. Y. Supp. 74 (affirmed, 146 N. Y. 403, 42 N. E. 542); *Keystone D. Co. v. Worth*, 117 N. C. 515, 23 S. E. 427; *People v. Firth*, 88 Misc. Rep. 217, 151 N. Y. Supp. 705.)

Argument for Respondents.

The noticing the case for trial after the jury has been discharged will have the effect of waiving trial by jury. (*Cole v. Terrell*, 71 Tex. 549, 9 S. W. 668; *Blankenship v. Parsons*, 113 Ala. 275, 21 So. 71.)

The statutory method of waiving a jury trial is not exclusive. (*Lindstrom v. Hope Lumber Co.*, 12 Ida. 715 (721), 88 Pac. 92; *Schumacher v. Crane-Churchill Co.*, 66 Neb. 440, 92 N. W. 609; *Keystone Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427.)

B. S. Crow and Wyman & Wyman, for Respondents.

The law is well settled that *assumpsit* is an action at law. (*Kreutz v. Livingston*, 15 Cal. 344, 345.)

A jury trial was had in the following cases for money had and received: *Minor v. Baldrige*, 123 Cal. 187, 55 Pac. 783; *Lutz v. Rothschild*, 4 Cal. Unrep. 888, 38 Pac. 360; *Donovan v. Purtell*, 216 Ill. 629, 75 N. E. 334, 1 L. R. A., N. S., 176; *Peterson v. Foss*, 12 Or. 81, 6 Pac. 397.

"It is no objection to the maintenance of this action that equitable principles are to some extent to be applied and that the money sought to be recovered is impressed with a trust in the hands of the holder." (*Merino v. Munoz*, 99 App. Div. 201, 90 N. Y. Supp. 985.)

Where the mortgagee or the party having a deed for the premises as security for the debt sells the same, the action for money had and received is the remedy. (*Lander v. Castro*, 43 Cal. 497; *Scranton v. Begol*, 60 Cal. 642.)

This being an action at law, the plaintiff was entitled to a trial by a jury.

"Under the provisions of the constitution of Idaho the right to trial by jury is never to be denied even though an accounting is involved." (*Russell v. Alt*, 12 Ida. 789, 88 Pac. 416, 13 L. R. A., N. S., 146; *Lindstrom v. Hope Lumber Co.*, 12 Ida. 714, 88 Pac. 92; *Robertson v. Moore*, 10 Ida. 115, 77 Pac. 218; *Dittemore v. Cable Milling Co.*, 16 Ida. 298, 133 Am. St. 98, 101 Pac. 593; *Davidson Grocery Co. v. Johnston*, 24 Ida. 336, Ann. Cas. 1915C, 1129, 133 Pac. 929.)

Opinion of the Court—Budge, C. J.

BUDGE, C. J.—In 1905 appellant procured from respondent \$6,500, for which he executed and delivered a warranty deed, conveying certain real estate, and a bill of sale of certain personal property. The money thus procured was to be repaid according to stipulated terms. The appellant, however, failed to make the payments as agreed, and in 1907 another arrangement was made, whereby appellant executed and delivered to respondent, Looney, a quitclaim deed to said real estate, and the latter surrendered all claim or ownership in and to the personal property, after satisfying a certain chattel mortgage of \$400 then due on said personal property. Thereafter respondent, Oakes, having purchased a one-half interest in the real estate described in the deed from the appellant to Looney, the whole was sold and conveyed to E. H. Dewey. Appellant alleges that the real estate thus conveyed was rightfully his and had been conveyed to Looney only as security for the money borrowed, and that he should be permitted to recover the sales price received by respondents, less the amount of the appellant's indebtedness to Looney.

While admitting that these deeds are absolute in form, the appellant asserts that it was the intention of the parties at the time of the transactions that they should serve as mortgages only. Although counsel presented the case upon the theory that the deeds given by appellant to respondent, Looney, were in fact mortgages, it appears that the complaint seeks to set out facts from which, if true, a constructive trust would arise in favor of the plaintiff. Under this theory, however, the result would be the same. But since the respondents have conveyed said property to E. H. Dewey, conceded for the purposes of this action to be an innocent purchaser, appellant is not seeking to set aside the deed from the respondents to said E. H. Dewey, but seeks to have the deed declared a mortgage as between himself and Looney in order to hold the respondents liable for the difference between the amount alleged to have been received by the sale to Dewey and the appellant's indebtedness to Looney. Upon this theory he instituted an action in the district court in and for Ada county, which was in form a common-law action of

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assumpsit for money had and received, to which a demurrer was interposed and sustained. Thereafter an amended complaint was filed, to which respondents filed an answer. The cause coming on for trial, appellant requested a jury trial, but the trial court, being of the opinion that the issues involved were equitable and that the action was one in equity and not at law, denied the request of appellant, who thereupon refused to proceed further with the trial of the cause, and the cause was thereupon dismissed.

This is an appeal from the judgment of dismissal, the appellant specifying as error the action of the trial court in denying his request for a jury trial, and insisting that this is an action at law, since the only relief that he can obtain under the pleadings is a money judgment. While, upon the other hand, the respondent contends that the latter deed, conveying the real estate, is an absolute conveyance, intended as such, and was given for the express purpose of extinguishing whatever title appellant may have had in and to the real property conveyed.

The important question raised in this case, therefore, is: Is this an action at law or a suit in equity? If the former, clearly the appellant was entitled to a jury trial and the judgment of the trial court should be reversed. It would be difficult and perhaps impossible in all cases to determine from the pleadings alone what should be deemed a suit in equity as distinguished from an action at law.

In this case one of the important facts to be decided is whether the second deed, given by appellant to Looney, was a deed absolute, and vested the title to the real estate therein described in fee simple in Looney, as it purported to do upon its face, or whether it was in truth and in fact a mortgage, intended as such and given for the purpose of securing an indebtedness, the equitable title to remain in the appellant. The latter is not seeking in this action to have the deed declared a mortgage for the purpose of redemption; nevertheless, in order for the appellant to recover under any circumstances, it will be necessary for the court or jury to

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determine whether the deed given by the appellant to Looney is a mortgage or an absolute conveyance.

Therefore, in determining the nature of the present action, this court must be influenced by the averments of plaintiff's petition or complaint and the body and substance of the relief which he is seeking. What relief is he seeking—is it primarily the cancelation of the deed? We think not. He is claiming an amount of money, the difference between the sales price received by the respondents from Dewey and the plaintiff's indebtedness to respondent, Looney, under the transactions herein involved. Admitting that, in order to entitle him to recover this surplus, he must show the conveyance to have been a mortgage instead of a deed; this proposition would seem to be only incidental to the real issue presented by the case, and, therefore, not controlling in determining whether it is a suit in equity or an action at law. The fact that there is an equitable question involved in a case is not decisive of its nature.

There is a rule of law dating almost as far back as the statute of frauds, which allows the purport of a written instrument to be varied by parol evidence, when such instrument is vague or indefinite, or when there is a hidden meaning not expressed in its terms, but which was equally intended to be a part of such transaction and binding upon the parties. The reason for this rule is very obvious. The appellant in this action seeks to establish what he contends to be the agreement between himself and Looney at the time the latter deed was given, which was not to bind them in the manner expressed in the written instrument. In order to do this it will be necessary for the appellant to show that the deed, though absolute on its face, was given to secure the payment of a fixed sum of money within a specified time and was intended as a mortgage. As affecting Oakes it must be shown that, at the time he purchased the one-half interest from Looney, he did so either with knowledge of the fact, if such be the fact, that the conveyance, from appellant to Looney, although a deed absolute in form, was intended as a mortgage, or that he was in possession of knowledge, or informed of such facts,

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as would be sufficient to put a prudent man upon inquiry, which inquiry, if prosecuted with reasonable diligence, would certainly have led to a discovery of the fact. (Pomeroy, 3d ed., sec. 597.) The general rule would seem to be that unless these facts are clearly shown, either by parol evidence or by attendant circumstances, such as the condition and relation of the parties, or gross inadequacy of price, the court would not be justified in upholding a judgment or verdict contrary to the rights of the parties as expressed in the written instrument. (*Wallace v. Johnstone*, 129 U. S. 58, 9 Sup. Ct. 243, 32 L. ed. 619.)

The perplexing question involved in this case is whether appellant is entitled to a jury trial in order that the facts and circumstances surrounding the giving of the latter deed may be submitted to a jury for the purpose of determining the character of the instrument. Aided by the decisions of appellate courts of other states, quoted below, we have reached the conclusion that sec. 7, art. 1, of the constitution, and secs. 4368 and 4369, Rev. Codes, secure to appellant the right of a jury trial, which cannot be denied him in the absence of a waiver.

The Nebraska case of *Yager v. Exchange National Bank*, 52 Neb. 321, 72 N. W. 211, is entitled to considerable weight, because of its analogous facts and of the sound reasoning of the opinion. There the petition alleged that the plaintiff had executed to the defendant a deed absolute in form, but in fact a mortgage; that the defendant had sold the land, receiving more than sufficient to pay the debt. The prayer was for judgment for that surplus. The court said:

“It is true that, in order to establish the plaintiff’s right to the money, it is necessary for him to show that a deed absolute in form was a mortgage; but the determination of this issue is only incidental to the main object of the action, which is the recovery of money. No decree declaring the trust is required, nor is it sought to establish any equitable interest in the land. It is merely necessary to prove these facts in order to accomplish another object. . . . We are very clearly of the opinion that the case before us was in

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its nature one for money had and received, that the plaintiff was entitled to a jury trial, and that the court erred in referring the case."

The case of *Boyce v. Allen*, 105 Iowa, 249, 74 N. W. 948, is almost as directly in point. There the court said:

"This complaint is grounded upon the claim that plaintiff cannot have the relief asked in these counts until the deed and bill of sale are reformed so as to make them conditional, instead of absolute, conveyances, and that equity alone can grant such reformation. . . . To entitle plaintiff to recover, it is only necessary to find the actual consideration which defendant was to pay for these properties, and to credit him with what he has paid in accordance with the agreement of the parties. . . . The plaintiff might have so drawn his pleadings as to demand the cancelation of the alleged deed of conveyance and the setting aside of the alleged settlement, but he did not do so. That the pleadings set out facts which, if true, would entitle plaintiff to equitable relief, is immaterial, so long as such relief is not demanded. . . . There was no error in overruling the motion to transfer to equity."

In the case of *Barchent v. Snyder*, 128 Wis. 423, 107 N. W. 329, where the facts are very similar, if not identical with those at bar, the plaintiff alleged that he deeded land to the defendant as security for a loan, taking back a land contract for reconveyance on payment of the debt, and that defendant thereafter wrongfully conveyed the land without authority, for a certain sum, and prayed that the deed and contract be adjudged to constitute a mortgage, and that defendant account for the amount received by him on the sale, less the amount of plaintiff's indebtedness and interest, and that plaintiff have judgment for such balance. The court said:

"The only relief necessary is a judgment for a certain definite sum of money held by the defendant which of right is alleged to belong to the plaintiff. This relief can be fully obtained in an action at law as for money had and received."

The same court in the case of *Kent v. Agard*, 24 Wis. 378, says:

Opinion of the Court—Morgan, J., Concurring.

“Indeed, it seems difficult to imagine any other action by which the plaintiff could bring the question to trial. If he should bring an equitable action, and ask to have the deed declared a mortgage, it would seem to be a sufficient answer to tell him that if it was a mortgage in fact, he could prove it in an action at law, and it would then have only the effect of a mortgage.”

For further authorities see the cases cited in the above opinions, and also: *Bogk v. Gassert*, 149 U. S. 17, 13 Sup. Ct. 738, 37 L. ed. 631; *Jordan v. Warner's Estate*, 107 Wis. 539, 83 N. W. 946; 8 Encyclopedia of U. S. Supreme Court Reports, 464. In the latter work it is said:

“The question as to whether a conveyance constitutes an absolute deed or a mortgage is a question of fact to be determined by the jury.”

We are frank to admit that upon a cursory examination of the complaint in this case we were strongly of the opinion that the suit was one in equity, but from a careful examination of the foregoing and many other authorities, it is evident that, not only were we mistaken in our first impression, but that the learned trial court was also wrong and erred in denying the appellant a jury trial. And since we view the serious question that is involved in this appeal to be the question of the right to a jury trial by the appellant, we do not deem it necessary to discuss in detail the second proposition urged by respondent, namely, that under the rules in force in the trial court the attorney for the appellant, if entitled to a jury trial, by his acts and conduct waived the same. We do not think the record would justify us in so holding. The judgment of the district court is reversed and the case is remanded, with instructions to grant the appellant a jury trial. Costs awarded to appellant.

Rice, J., concurs.

MORGAN, J., Concurring.—I concur in the conclusion reached in this case, but dissent from that portion of the opinion referred to in the third and fourth sections of the syllabus, for the reason that it appears to me to be *obiter dictum*.

Argument for Appellant.

(February 23, 1917.)

L. C. SMITH, Appellant, v. R. A. GRAHAM, ST. JOHN SKINNER and JOHN J. PILGERRIM, Respondents.

[164 Pac. 354.]

EXECUTION — THIRD PARTY CLAIMANT — INDEMNITY BOND — DUTY OF OFFICER—INSTRUCTIONS.

1. Under the provisions of sec. 4478, Rev. Codes, as amended by the Sess. Laws 1913, p. 308, where property levied on by a constable is claimed by a stranger to the writ, the officer is not bound to proceed further with the execution of his writ; but when he has demanded and accepted indemnity, he is bound to proceed and rely on his bond in indemnity.

2. Where it appears that the only question properly at issue in an action was as to whether or not the defendant had performed his statutory duty as constable in proceeding to levy upon sufficient property of the judgment debtor to satisfy the judgment, and that the question of the solvency of the judgment debtor was therefore immaterial, an instruction by the trial court upon the latter question is error.

3. *Held*, that the question of the exemption of the property levied upon is not involved in this case, as it appears that the judgment debtor made no claim of exemption, and the court accordingly erred in instructing the jury upon the question of exemption.

[As to right of sheriff or constable to indemnity while engaged in executing civil process, see note in 89 Am. St. 441.]

APPEAL from the District Court of the Fourth Judicial District, for Twin Falls County. Hon. Chas. O. Stockslager, Judge.

Action for damages. From a judgment for defendant, plaintiff appeals. *Reversed and remanded.*

James H. Wise, for Appellant.

Upon the pleadings and the testimony in this cause, the matter should be reversed and judgment entered for the plaintiff. (*Smith v. Graham*, 25 Ida. 174, 136 Pac. 801.)

Opinion of the Court—Budge, C. J.

Where there is no substantial conflict in the evidence, and the evidence is insufficient to support the verdict, the judgment will be reversed and judgment directed to be entered in favor of the plaintiff. (*Southwest Nat. Bank v. Baker*, 23 Ida. 428, 130 Pac. 799.)

Longley & Hazel, for Respondents, file no brief.

BUDGE, C. J.—Appellant here recovered a judgment against one Dora Patrie in the probate court of Twin Falls county, on June 24, 1911, for the satisfaction of which a writ of execution was duly issued out of said court on August 14, 1911, and by respondent, as constable of precinct No. One, Twin Falls county, levied upon certain personal property alleged to have been the property of said Patrie. On August 16, 1911, one Cherry notified the respondent Graham that he was the owner of said property, and demanded that the title to the same be tried by a constable's jury, as provided for by sec. 4478, Rev. Codes, as amended by the Sess. Laws 1913, p. 308. Whereupon Graham summoned said jury, to whom the question of the ownership of the property was submitted; the jury found that the property belonged to Cherry. Thereupon Graham notified appellant that he would not proceed further under the execution unless indemnified by appellant. On August 29, 1911, the appellant furnished Graham with a bond in the sum of \$600 which was accepted and filed with the probate court on September 1, 1911, and the said property, levied upon under the writ of execution, was on that day advertised to be sold on September 7, 1911. On September 2, 1911, however, it appears that Graham returned the execution wholly unsatisfied.

This action was commenced against Graham and his sureties on his official bond to recover damages for his alleged failure and neglect to properly perform the official duties of his office as such constable of said precinct, in that he failed, neglected and refused to satisfy said judgment by the sale of the said property, levied upon by him after he had been furnished, upon demand, and accepted an indemnity bond.

Opinion of the Court—Budge, C. J.

This controversy was before this court upon a prior occasion and will be found reported in 25 Ida. 174, 136 Pac. 801, to which reference may be had for a more detailed statement of the facts.

We deem it necessary to consider only the two following assignments of error; first, that the verdict of the jury was contrary to the evidence; second, the action of the trial court in giving and refusing to give certain instructions. The assignments will be discussed in the order stated.

It is admitted in this case that judgment was duly entered; that a writ of execution issued out of the probate court; that said writ was delivered to the respondent, Graham, as constable of said precinct, and that he levied upon certain personal property alleged to have been the property of the judgment debtor; that the property was claimed by a third party, whereupon an indemnity bond was demanded, furnished, accepted and filed with the probate court; that the property was advertised for sale; and that the execution was returned unsatisfied. Under these facts, in our opinion, the appellant was entitled to recover judgment against the constable, Graham, and his sureties.

Sec. 4478, Rev. Codes, as amended by the Sess. Laws 1913, p. 308, provides:

“If the property levied upon be claimed by a third party as his property by a written claim . . . and stating the grounds of such title, and served upon the sheriff, the sheriff is not bound to keep the property, unless the plaintiff, or the person in whose favor the writ of execution runs, on demand, indemnify the sheriff against such claim by an undertaking by at least two good and sufficient sureties.”

As was stated in substance in the former opinion in this case: This statute was enacted for the purpose of meeting the kind of a situation which arose in this transaction. Where the officer entertains doubt as to the title to the property or the right of the third person who claims it, he may call a jury of his own selection. If the jury returns a verdict that the property belongs to the third party claimant, then the statute is explicit to the effect that the officer “may re-

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linquish the levy, unless the judgment creditor give him a sufficient indemnity for proceeding thereon." After the jury has decided against the title of the execution debtor, the respondent may refuse to proceed a step further with the execution of the writ unless he receives a satisfactory indemnity bond from the execution creditor. When that bond is given the sheriff no longer has any discretion, he must proceed and sell the property, for the reason that he has received security sufficient to cover all damages which may be recovered against him in the event the third party claimant is able to establish his title to the property, in a judicial proceeding and obtain a judgment in damages for conversion of the property. (*Smith v. Graham, supra.*)

In the case of *Corson v. Hunt*, 14 Pa. St. 510, 53 Am. Dec. 568, the court said:

"It is in full proof that an execution was put into the hands of the defendant, who was a constable, by the justice, and that a short time afterwards he said he had levied, but that some person had claimed the property. A bond of indemnity was then given to him, at his request, which he accepted, expressing himself satisfied therewith. Notwithstanding which, the constable made the following false return: 'Returned for want of sufficient indemnification.' . . . He was bound to proceed to sell the goods levied upon in satisfaction of the debt, and his neglect or omission to do so rendered him responsible to the plaintiffs for the amount of the execution, . . . but having demanded and accepted indemnity, . . . he is compelled on his part to proceed to a sale of the goods, and must look to his bond for indemnity."

To the same effect are the following authorities: *Adams v. Disston*, 44 N. J. L. 662, *Stone v. Ponter*, 5 Munf. (Va.) 287, *Davis v. Tibbats*, 7 J. J. Marsh. (30 Ky.) 264, 10 R. C. L. 1285, and *Murfree on Sheriffs*, par. 614.

We think the general rule to be that under a statute such as we have in this state (sec. 4478, Rev. Codes, as amended by the Sess. Laws 1913, p. 308), after an execution issued upon a valid judgment is delivered to a sheriff or constable it is his duty to proceed and levy upon sufficient of the prop-

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erty of the judgment debtor to satisfy the judgment, and if the property so levied upon be claimed by a third party he may refuse to proceed further and demand a bond of indemnity; and if this is furnished by the judgment creditor and accepted by the officer it then becomes his duty to sell the same, unless enjoined by a court of competent jurisdiction, and he cannot justify his refusal to sell such property by showing that it did not belong to the judgment debtor or was not subject to levy.

All of the material facts alleged in the plaintiff's complaint are admitted by the answer, and are supported by the undisputed evidence in the case. We have examined the instructions given by the trial judge, and without discussing them separately, will say that many of them are erroneous as well as misleading and only tended to confuse the minds of the jury. The learned trial court proceeded upon the erroneous theory that the question of exemption of the property levied upon was involved, although it clearly appeared that the judgment debtor made no such claim. It further appears that the question of the solvency of the judgment debtor was made an issue upon the trial, which was also wholly immaterial. The judgment of the court is reversed and the cause remanded with instructions to the trial court to enter judgment in favor of the appellant and against respondents, as prayed for in plaintiff's complaint. Costs awarded to appellant.

Morgan and Rice, JJ., concur.

Points Decided.

(February 23, 1917.)

E. C. DAVIS, Plaintiff, v. STATE, Defendant.

[163 Pac. 373.]

CLAIMS AGAINST THE STATE—CONSTITUTIONAL AND STATUTORY PROVISIONS—JURISDICTION OF STATE BOARD OF EXAMINERS AND SUPREME COURT—LIABILITY OF STATE FOR NEGLIGENCE OF SERVANTS OR EMPLOYEES—CLAIMS AGAINST THE STATE AS A PROPRIETOR.

1. Sec. 109, Rev. Codes, limits the time within which a claim against the state may be presented to the state board of examiners to two years after the claim has accrued. After the expiration of this period the state board of examiners is without jurisdiction to consider the claim.

2. Under the provisions of sec. 10, art. 5, and sec. 18, art. 4, of our constitution the method prescribed for presenting and prosecuting to a conclusion the claims against the state is that in the first instance such claim must be presented in proper form to the state board of examiners; if rejected by said board the supreme court has original jurisdiction of an action upon a proper claim and may in some cases give a recommendatory judgment, which in turn must be presented to the legislature to be by it allowed or disallowed.

3. The fact that under sec. 10, art. 5, of the constitution the supreme court has original jurisdiction to hear claims against the state does not relieve claimants of the obligation in the first instance of presenting their claims to the state board of examiners.

4. An amendment to a complaint will not be permitted where the complaint, even if so amended, would fail to state a cause of action, under the general rule that amendments to pleadings should be permitted in furtherance of justice.

5. States cannot be sued without their consent, and when by constitutional or statutory provisions the state has permitted itself to be sued, such permission does not render the state liable for the careless or negligent acts of its servants, employees or agents in the absence of any statute expressly fixing such liability upon a state.

6. The word "claims" as used in art. 5, sec. 10, of the constitution of this state does not include any claim for damages caused by the careless or negligent acts of the state's servants, employees or agents, and in the absence of any statute expressly making the state liable in such cases no such liability exists.

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7. Complaint of D. alleged that the state of Idaho owned and operated an irrigation system; that by reason of the negligence and carelessness of the state and its servants, employees and agents a ditch of said system broke, causing large quantities of water to flow upon, over and across D.'s land, resulting in the alleged damage. *Held*, not to state a cause of action as against the state, and not to disclose a state of facts giving rise to a "claim" within the meaning of art. 5, sec. 10, of the constitution.

8. Under sec. 109, Rev. Codes, no claim which is not provided for by law may be presented, audited, set off or sued upon.

9. *Held*, that in the absence of a statute or constitutional provision making the state as a proprietor liable for the careless or negligent acts of its servants, employees or agents, this court is without jurisdiction to grant any relief to plaintiff, under the facts alleged in plaintiff's complaint.

[As to the liability of a state for the torts of its officers, see note in *Ann. Cas.* 1913A, 1038.]

Original action brought against the state for the purpose of procuring a recommendatory judgment. The state interposed a demurrer. *Demurrer sustained.*

E. G. Davis and Paul S. Haddock, for Plaintiff, file no brief.

T. A. Walters, Atty. Genl., A. C. Hindman and J. Ward Arney, Assts., for Defendant.

An action for damages cannot be maintained against a state unless the state has, by voluntary legislative enactment, granted such consent or assumed the particular liability which is the occasion of the action. (8 L. R. A. 399, note.)

A citizen will not be permitted to bring action against the state on an alleged claim arising from the negligence, carelessness, misfeasance, malfeasance or nonfeasance of the state or its officers, except in those jurisdictions where, by reason of constitutional provisions or legislative enactment, such actions are permitted. (8 L. R. A. 399, note; 42 L. R. A. 33, note.)

PER CURIAM.—This is an action brought by the plaintiff against the state of Idaho for a recommendatory judgment

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for damages alleged to have been sustained on the plaintiff's land by reason of the alleged carelessness and negligence of the defendant and its duly authorized officers and agents acting in its behalf. The facts, so far as they relate to the questions here involved, are as follows: That on May 1, 1908, the defendant, state of Idaho, entered into a contract in writing with the Kings Hill Irrigation & Power Company, Limited, under which said company agreed to construct a certain irrigation system in the counties of Owyhee and Twin Falls, in the state of Idaho, for the irrigation and reclamation of certain designated arid tracts of land, including the land of the plaintiff; that the project was one commonly called a Carey Act project; that the plaintiff was one of the settlers upon land included within the project; that he made his final proof, on his said lands, to the state of Idaho on June 19, 1912, which proof was accepted by the state board of land commissioners of the state of Idaho and final certificate No. 169 issued to plaintiff; that ever since the entry of the said land and the making of final proof the plaintiff has been the owner and in the possession thereof; that prior to the year 1914 the said Kings Hill Irrigation & Power Company, Limited, became insolvent and was foreclosed in the federal district court, for Idaho, in mortgage foreclosure proceedings; that at the sale of the said system under said proceedings the state of Idaho, on March 10, 1914, succeeded through purchase of said system to all the rights and interest of the said company in the said project, and that since said date the state has been and now is the owner of said irrigation system, and operated said system during the irrigation season of 1914; that on July 1, 1914, an irrigation ditch of said system broke and allowed large quantities of water to run on and across the plaintiff's land, doing the damage alleged; it is alleged "that on or about the 3d day of November, 1916, the plaintiff filed with the board of examiners of the state of Idaho" a claim for reimbursement of his damages, which claim was by the said board rejected and marked disallowed.

The defendant has demurred to the complaint on two grounds; first, that said complaint does not state facts suffi-

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cient to constitute a cause of action; second, that the above-entitled court has no jurisdiction of the subject matter of said action as set forth in said amended complaint.

Sec. 18, art. 4, of the constitution of Idaho provides: "The Governor, Secretary of State and Attorney General . . . shall also constitute the Board of Examiners, with power to examine all claims against the state, except salaries or compensations of officers fixed by law, and perform such other duties as may be prescribed by law. And no claim against the state, except salaries and compensation of officers fixed by law, shall be passed upon by the legislature without first having been considered and acted upon by said board."

Sec. 109, Rev. Codes, provides: "All persons having claims against the state must exhibit the same, with the evidence in support thereof, to the Auditor, to be audited, settled and allowed by the Board of Examiners, within two years after such claim shall accrue, and not afterward. . . . No claim which is not provided for by law shall be audited or set off."

It appears from the amended complaint that the alleged claim of plaintiff accrued on the 1st day of July, 1914, and that the same was presented to the state board of examiners on or about November 3, 1916. The legislature has seen fit, by sec. 109, Rev. Codes, to limit the time within which a claim may be presented to said board to two years after the claim has accrued. As far as the amended complaint shows, the alleged claim of plaintiff was not presented to the board until several months after the two year period had expired. It would appear that the said board was without jurisdiction to consider this alleged claim at the time it was presented.

In the case of *Pyke v. Steunenberg*, 5 Ida. 614-618, 51 Pac. 614, 615, this court said:

"The jurisdiction is conferred upon this court by the constitution (sec. 10, art. 5) to hear claims against the state, and to make decisions thereon, which decisions 'shall be merely recommendatory'; and this court has declined to hear any claims against the state until the same shall have been passed upon by the board of examiners."

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It will be remembered that under the provisions of sec. 10, art. 5, this court has original jurisdiction to hear claims against the state, that its decisions are merely recommendatory, and that they shall be reported to the next session of the legislature for its action. It will also be remembered that sec. 18, art. 4, provides that no claim against the state, except salaries and compensation of officers, fixed by law, shall be passed upon by the legislature without first having been considered and acted upon by the board of examiners. (*Kroutinger v. Board of Examiners*, 8 Ida. 463, 69 Pac. 279; *Bragaw v. Gooding*, 14 Ida. 288, 94 Pac. 438; *Pyke v. Steunenberg*, *supra*.)

Construing these two sections together it would appear that only one method of presenting and prosecuting to a conclusion claims against the state has been provided: that in the first instance a claim must be presented in proper form to the state board of examiners, and if there rejected this court has original jurisdiction of suits upon proper claims and may in some cases give a recommendatory judgment, which in turn shall be presented to the next legislature to be allowed or disallowed. The mere fact that this court has original jurisdiction to hear claims against the state does not relieve claimants of the obligation in the first instance of presenting their claims to the state board of examiners.

So far as the amended complaint discloses, the state board of examiners was without jurisdiction to even consider the claim of plaintiff at the time it was presented on November 3, 1916. In the case of *Small v. State*, 10 Ida. 1, 76 Pac. 765, this court dismissed a petition on the ground that the claim therein set forth was barred by the statute of limitations. It is true that the court there had under consideration the provisions of sec. 4053, Revised Statutes, but sec. 109, Rev. Codes, does not appear to have been called to the attention of the court in that case. The language of sec. 109 is clear and susceptible of only one construction; that is, that in order to be audited a claim must be presented to the state board of examiners within two years. The exact language of the sec-

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tion being, "within two years after such claim shall accrue, and not afterward."

From what has been said it appears that this court should decline to exercise jurisdiction or to hear or pass upon the plaintiff's alleged claim. It is true the plaintiff's original complaint, which was filed in this court on April 8, 1915, contained an allegation that plaintiff's claim had theretofore been presented to the board of examiners and that the board had failed and refused to pay the same or any portion thereof. However that may be, plaintiff's amended complaint appears to be based upon the claim which was filed and acted upon by said board long subsequent to the filing of the original complaint and, so far as the amended complaint shows, was filed as a new claim, and as has been indicated appears to be barred by the statute of limitations as set forth in sec. 109, Rev. Codes.

From what appears in the original complaint and from statements by counsel for the plaintiff at the hearing, it might be possible for the plaintiff to so amend his amended complaint as to bring it within the statute, and if we did not deem it necessary to dispose of the case upon other grounds, we would be inclined to give plaintiff an opportunity to further amend.

The demurrer on the part of the state raises two questions; first, as to whether the complaint states facts sufficient to constitute a cause of action against the state; second, as to whether this court has jurisdiction of the subject matter of the action.

Art. 5, sec. 10, of the constitution of Idaho gives this court original jurisdiction in actions upon claims against the state. Hence at the outset it becomes necessary to determine whether or not the facts presented by plaintiff's complaint constitute such a claim against the state as comes within the purview of the constitutional provision.

It has been held in a long line of authorities that a state is not liable for the carelessness or negligence of its servants, employees or agents. (See the extended notes in 8 L. R. A. 399; 42 L. R. A. 64, subd. 13; Ann. Cas. 1913E, 1038.)

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The general proposition that a state cannot be sued without its consent is held by the overwhelming weight of authority; see the notes above cited; also note to *McElroy v. Swart*, 57 Mich. 500, 24 N. W. 766. The cases seem uniformly to hold not only that states cannot be sued without their consent, but further that, even when by constitutional provision or legislative enactment the state has permitted itself to be sued, the mere fact of permitting the suit against itself does not render the state liable for the careless or negligent acts of its servants, employees or agents, in the absence of any statute expressly fixing such liability upon the state.

One of the leading cases upon this point appears to be the case of *Murdock Parlor Grate Co. v. Commonwealth*, 152 Mass. 28, 24 N. E. 854, 8 L. R. A. 399. In that case the court said:

“But we do not find that demands founded on the neglect or torts of ministerial officers engaged as servants in the performance of ministerial duties which the state as a sovereign has undertaken to perform have ever been held to render it liable. Nor does this rest upon the narrow ground that there are no means by which such obligations can be enforced, but on the larger ground that no obligations arise therefrom. Municipalities, such as cities and towns, are created by the commonwealth in order that it may exercise through them, a part of its power of sovereignty. Where they are engaged in the performance of public duties imposed upon them by statute, they are not liable to private actions of tort for the negligence of their agents employed for this purpose, unless such action is provided by the statute.” Citing the well-considered case of *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332.

In the case of *Houston v. State*, 98 Wis. 481, 74 N. W. 111, 42 L. R. A. 39, Cassoday, Chief Justice, after citing several of the leading authorities in support of the proposition that no state could be sued in any court without its express consent, said:

“Our constitution expressly provides that ‘the legislature shall direct by law in what manner and in what courts suits may be brought against the state.’ Wis. Const., art. 4, sec. 27. In pursuance of that provision, the legislature at an early

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day provided that 'it shall be competent for any person, deeming himself aggrieved by the refusal of the legislature to allow any just claim against the state, to commence an action against the state, by filing a complaint, setting forth fully and particularly the nature of such claim, with the clerk of the supreme court, either in term time or in vacation.' Rev. Stat., sec. 3200. This section only relates to claims which, if allowed, render the state a debtor to the claimant. *Chicago, M. & St. P. Ry. Co. v. State*, 53 Wis. 509, 10 N. W. 560; *Clodfelter v. State*, 86 N. C. 51, 41 Am. Rep. 440; *State v. Hill*, 54 Ala. 67. This statute does not include a demand based upon the unlawful and tortious acts of officers or agents of the state. *Hill v. United States*, 149 U. S. 593, 13 Sup. Ct. 1011, 37 L. ed. 862."

The court then quoted as authority for the same proposition the case of *Murdock Parlor Grate Co. v. Commonwealth*, *supra*. The opinion goes on to say:

"The law is well established that neither the state nor the United States is answerable in damages to an individual for an injury resulting from the alleged misconduct or negligence or tortious acts of its officers or agents. *Gibbons v. United States*, 8 Wall. (75 U. S.) 269, 19 L. ed. 453; *Langford v. United States*, 101 U. S. 341, 25 L. ed. 1010; *German Bank v. United States*, 148 U. S. 573, 13 Sup. Ct. 702, 37 L. ed. 564; *Clark v. State*, 7 Cold. (47 Tenn.) 306."

In the last case cited it was held that the Tennessee Code, sec. 2807, providing that actions may be instituted against the state under the same rule which regulates actions against individuals, was only intended to give a remedy and did not create any liability. The force of this distinction is brought out clearly in *Green v. State*, 73 Cal. 29, 11 Pac. 602, 14 Pac. 610. In that case the plaintiffs were authorized to sue the state for damages alleged to have been suffered by them by reason of certain canal improvements made by the state, and to have judgment therefor "if it appears upon the trial . . . that damage has been done [to the plaintiffs] by any act for which the state is legally liable." The court there held, "That the language of the act excludes the idea that any lia-

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bility was admitted, or any defense waived, except that of immunity from suit," and affirmed a judgment sustaining the demurrer, which was interposed on behalf of the state, the first two grounds of which were the same as the grounds of the demurrer in the case at bar.

A more recent case is that of *Riddoch v. State*, 68 Wash. 329, Ann. Cas. 1913E, 1033, 123 Pac. 450, 42 L. R. A., N. S., 251. This was an action to recover damages for personal injuries sustained by the plaintiff by reason of the giving way of a railing of a gallery in the armory building in the city of Seattle. It appears that the building in question belonged to the state of Washington and had been leased to the Seattle Athletic Club, and that the alleged injuries were sustained during an entertainment given therein by the club.

The constitution of Washington, sec. 26 of art. 2, provides: "The legislature shall direct by law in what manner and in what courts suits may be brought against the state."

The court, in the last-mentioned case, upon this point says:

"This provision creates no cause of action—imposes no liability, as against the state, where none would exist independently of it. It merely directs the legislature to provide a remedy for causes of action recognized at common law as against the sovereign or created by statute."

It appears that pursuant to the constitutional provision above quoted the legislature of the state of Washington, Laws of 1895, p. 188, sec. 1 (Rem. & Bal. Code, sec. 886), enacted that:

"Any person or corporation having any claim against the state of Washington shall have the right to begin an action against the state in the superior court of Thurston county."

The court in the same case says: "The word 'claim' as used in this section is synonymous with 'cause of action.' The scope of the section is the same as that of the constitutional provision. *Northwestern & Pacific Hypotheek Bank v. State*, 18 Wash. 73, 50 Pac. 586, 42 L. R. A. 33. It creates no cause of action. It provides a remedy for existing causes but imposes no new liability. It does not waive any defense. *Billings v. State*, 27 Wash. 288, 67 Pac. 583."

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The court then quotes as authority from *Billings v. State, supra*, as follows: "It [the state] has not consented, either expressly or impliedly, to become responsible for the misconduct or negligence of its officers or agents; and, in the absence of a statute making it liable in damages therefor, no such action as the present one can be maintained against the state."

After going more fully into the rule and quoting all of the leading authorities the court proceeds to make a distinction which is particularly in point in the case at bar. There, as here, the complaining party sought to confine a rule of nonliability for torts to case where the negligence of the officer or agent occurred in the discharge of some purely governmental function of the state, and further contended that in leasing the armory the state was engaging in a private enterprise and that the rule of nonliability did not apply. The court, upon this point, says:

"The question is admittedly a new one. No authority distinctly so holding, nor indeed recognizing such exception, has been cited and we have found none."

The court, in the *Riddoch* case, then proceeds to review and point out the distinction between such a liability upon the part of a municipal corporation on the one hand and upon the part of the state on the other, and continuing says:

"On the other hand, the state is inherently sovereign at all times and in every capacity. It is the organized embodiment of the sovereign power of the whole people. By reason of this sovereignty, it possesses all powers, but only such powers as are within the limitations of the state constitution and without the prohibitions of the Federal constitution. It can do no act except in the exercise of this sovereign power and within these constitutional limitations. If it may constitutionally take over any enterprise, though usually of the nature of a private business, the very taking over is an exercise of this sovereign power. It seems much more logical and much more consonant with the idea and genius of sovereignty that the enterprise thus taken over should be impressed with the sovereign character of the state than that the state should become hampered by the private character

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of the enterprise. The latter result is incompatible with the concept of sovereignty."

And again the court says: "There is no statute whereby this state has assumed a liability for the negligence or misfeasance of its officers or agents, and we find no established principle of law sustaining such a liability in the absence of such statutory assumption. No consideration of hardships to be avoided would justify a court in abrogating established principles of substantive law to create a liability not so assumed. To change substantive law is the province of the legislature, not of the courts. Nor can the argument that it is the tendency of the times for states to take over and administer for the people interests and enterprises heretofore deemed of a private nature alter the case. On the contrary, the state can only do these things in the exercise of its sovereign and constitutional powers; and as part and parcel of these same sovereign powers, it alone can say through its legislature when and how it shall waive its immunity from liability for tort."

In the case just quoted from, the court affirmed a judgment sustaining a demurrer to the complaint. The case, as before indicated, is particularly in point in the case at bar.

No statute has been called to our attention authorizing a suit of this character or waiving in the slightest degree the immunity of the state from all liability for the careless or negligent acts of its servants, employees and agents. In the absence of such a statute this court is powerless to grant any relief under circumstances such as are presented by the plaintiff's amended complaint. From our investigation of the authorities and the principles involved we are satisfied that the word "claim" or "claims" as it appears in art. 5, sec. 10, of our constitution does not include any claim for damages caused by the negligent acts of the state's servants, employees or agents. And further, that in the absence of any statute expressly making the state liable in such cases no such liability exists.

The New York cases holding the state liable under such circumstances not only do not weaken, but tend to strengthen

Points Decided.

this position, for the reason that the liability in those cases arose by virtue of statutes. This was the situation in *Sayre v. State*, 123 N. Y. 291, 25 N. E. 163; *Waller v. State*, 144 N. Y. 579, 39 N. E. 680. There are a number of other cases from that jurisdiction, but those we have cited will serve to illustrate the principle.

Not only has the legislature in this state failed to provide a statute creating a liability on the part of the state, under circumstances such as are alleged in plaintiff's complaint, but the legislature seems to have intended to forestall any such contention. The last sentence of sec. 109, referred to *supra*, is as follows:

"No claim which is not provided for by law shall be audited or set off."

This clause seems to strengthen the position we have taken.

Upon the authorities cited and for the reasons herein expressed, the demurrer must be sustained and the action dismissed. Costs awarded to defendant.

(February 23, 1917.)

L. M. SMITH, Respondent, v. CONSOLIDATED WAGON & MACHINE COMPANY, a Corporation, and H. C. VAN AUSDELN, as Sheriff of Twin Falls County, Idaho, Appellants.

[163 Pac. 609.]

CHATTEL MORTGAGES—NOTICE—COMITY BETWEEN STATES.

1. By reason of comity between states, if personal property situated in a given state is there mortgaged by the owner and the mortgage is duly executed and recorded as by the local law required so as to create a valid lien, and if the property is thereafter removed into another state and is there sold to a purchaser without knowledge of the encumbrance, such purchaser takes title subject to the lien of the mortgage although it has not been recorded in the latter state, and this is particularly true when the removal is accomplished without the knowledge or consent of the mortgagee.

Argument for Appellants.

2. In order to invoke the doctrine of comity between states with respect to contracts, it is incumbent upon a party claiming such a benefit to show that his is such a contract as is contemplated by the doctrine. He must produce proof that the contract in behalf of which he seeks to invoke this rule is a foreign contract contemplated by the rule.

[As to enforcement of chattel mortgage in foreign state to which the goods had been removed by the mortgagor, see note in *Ann. Cas.* 1914B, 1252.]

APPEAL from the District Court of the Fourth Judicial District, for Twin Falls County. Hon. Chas. O. Stockslager, Judge.

Suit to enjoin sale of mortgaged property. Judgment for plaintiff. *Affirmed.*

James H. Wise, for Appellants.

Under sec. 3419, Rev. Codes, the sale or transfer by Ewing to Smith is void and the mortgagor, Ewing, is guilty of larceny. (*Studebaker Bros. Co. v. Mau*, 13 Wyo. 358, 110 Am. St. 1001, 80 Pac. 151.)

A creditor of the mortgagor attaching the property of a purchaser of it must look to the title. The purchaser or creditor is bound to inquire at the former residence of the owner for encumbrances there recorded. (*Jones on Chat. Mort.*, 260A; *Smith v. McLean*, 24 Iowa, 322; *Feurt v. Rowell*, 62 Mo. 524; *Kanaga v. Taylor*, 7 Ohio St. 134, 70 Am. Dec. 62; *Cool v. Roche*, 20 Neb. 550, 31 N. W. 367; *Lathe v. Schoff*, 60 N. H. 34; *Hornthal v. Burwell*, 109 N. C. 10, 26 Am. St. 556, 13 S. E. 721, 13 L. R. A. 740.)

The law of the place of contract, when this is also the place where the property is, governs as to the nature, validity, construction and effect of a mortgage, which will be enforced in another state, as a matter of comity, although not executed or recorded according to the requirements of the law of the latter state. (*Jones on Chat. Mort.*, 5th ed., sec. 299; *Blyth & Fargo Co. v. Houtz*, 24 Utah, 62, 66 Pac. 611; *Handley v. Harris*, 48 Kan. 606, 30 Am. St. 322, 29 Pac. 1145, 17 L. R. A. 703;

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Ramsey v. Glenn, 33 Kan. 271, 6 Pac. 265; *Douglas v. Douglas*, 22 Ida. 336, 125 Pac. 796.)

H. C. Hazel, for Respondent.

Where a chattel mortgage is not filed for record as required by sec. 3408, Rev. Codes, a subsequent purchaser of the property is not bound by the mortgage unless he is shown to have had actual notice of the same. (*Cowden v. Finney*, 9 Ida. 619, 75 Pac. 765; *Cowden v. Mills*, 9 Ida. 626, 75 Pac. 766.)

This being an appeal from the judgment and no motion for a new trial having been made, this case is brought within the rule that where there is substantial evidence to support the verdict or substantial conflict in the evidence, the supreme court is prohibited from setting aside such judgment. (*Buster v. Fletcher*, 22 Ida. 172, 182, 125 Pac. 226; *State v. Silva*, 21 Ida. 247, 256, 120 Pac. 835; *Eaves v. Sheppard*, 17 Ida. 268, 272, 134 Am. St. 256, 105 Pac. 407; *Gassen v. Hendrick*, 74 Cal. 444, 16 Pac. 242.)

MORGAN, J.—On May 21, 1913, D. J. Ewing and his wife, who resided in Salt Lake City, Utah, made, executed and delivered to appellant, Consolidated Wagon & Machine Company, a Utah corporation, a mortgage on a certain mare to secure the payment of \$155, being the purchase price of a wagon and harness. The mortgage was duly witnessed and it was provided therein, among other things, that the mare should remain in possession of the mortgagors.

On or about September 3, 1913, Ewing, who had theretofore, without the knowledge or consent of appellant corporation, removed with the mortgaged property to Twin Falls county, Idaho, traded and disposed of it, for a valuable consideration, to respondent, who had no knowledge of the mortgage. Thereafter the attorney for appellant corporation commenced proceedings, by affidavit and notice to the sheriff of Twin Falls county, to foreclose its mortgage. The sheriff took the mare into his possession and gave notice of sale, as by law provided, whereupon this action was commenced to

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procure an injunction restraining appellants from proceeding with the sale.

The case was tried to a jury, sitting in an advisory capacity, which returned its verdict in favor of the plaintiff. Findings of fact and conclusions of law were made and judgment was thereupon entered decreeing that appellants be perpetually enjoined from selling, disposing of or otherwise interfering with the property and that possession thereof be restored to respondent. This appeal is from the judgment.

It appears from the record that the mortgage was accompanied by the affidavit of Ewing and his wife, subscribed and sworn to on May 21, 1913, to the effect that it was made in good faith for the purpose of securing the amount named therein and without any design to delay or defraud their creditors. A like affidavit was, on August 8, 1913, made for and on behalf of appellant corporation by Grant Hampton, its secretary and treasurer. The mortgage was filed for record in Salt Lake county, Utah, on August 12, 1913, and never has been filed or recorded in Idaho.

The question presented by this appeal is: Does this mortgage constitute a lien upon the property which is enforceable against respondent?

The great weight of judicial opinion is that, by reason of comity between states, if personal property, situated in a given state is there mortgaged by the owner and the mortgage is duly executed and recorded as by the local law required so as to create a valid lien, and if the property is thereafter removed into another state and is there sold to a purchaser without knowledge of the encumbrance, such purchaser takes title subject to the lien of the mortgage although it has not been recorded in the latter state, and this is particularly true when the removal is accomplished without the knowledge or consent of the mortgagee. (6 Cyc. 1089; Jones on Chattel Mortgages, 5th ed., sec. 260a; 5 R. C. L. 399, sec. 21; *Shapard v. Hynes*, 104 Fed. 449, 45 C. C. A. 271, 52 L. R. A. 675; *Kanaga v. Taylor*, 7 Ohio St. 134, 70 Am. Dec. 62; *Ord Nat. Bank v. Massey*, 48 Kan. 762, 30 Pac. 124, 17 L. R. A. 127; *Handley v. Harris*, 48 Kan. 606, 30 Am. St. 322, 29 Pac. 1145,

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17 L. R. A. 703; *Hornthal v. Burwell*, 109 N. C. 10, 26 Am. St. 556, 13 S. E. 721, 13 L. R. A. 740; *Smith v. McLean* 24 Iowa, 322; *Keenan v. Stimson*, 32 Minn. 377, 20 N. W. 364.)

The law by which the validity of the lien of this mortgage must be tested is sec. 150, Compiled Laws of Utah (1907), and is as follows:

“What Necessary to Validity. Unless the possession of personal property be delivered to and retained by the mortgagee, no mortgage thereof shall be valid as against the right and interests of any person other than the parties thereto unless:

“1. The mortgage, duly witnessed by at least one person, provide that the property may remain in the possession of the mortgagor;

“2. The mortgage be accompanied by the affidavit of the parties thereto, or, in case any party is absent, by the affidavit of the parties present and that of the agent or attorney of such absent party, that the same is made in good faith to secure the amount named therein and without any design to hinder or delay the creditors of the mortgagor;

“3. The mortgage, or a copy thereof, be filed in the office of the recorder of the county where the mortgagor resides, or, in case he is a nonresident of this state, in the office of the recorder of the county or counties where the property may be at the time of the execution of the mortgage.”

Since the property remained in possession of the mortgagors it was necessary, before the mortgage could become a valid lien as against the rights and interests of any person, other than the parties thereto, that it be accompanied by the affidavit mentioned in the statute above quoted, and it was further necessary that the instrument itself, or a copy thereof, be filed in the office of the recorder of Salt Lake county, Utah, where the mortgagor resided and where the property was situated, and that these things be done while the property was within that state.

In case of *Yund v. First Nat. Bank*, 14 Wyo. 81, 82 Pac. 6, the supreme court of Wyoming, having under consideration

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a case growing out of facts quite similar to those involved herein, said:

"The mortgage was void as against creditors of the mortgagor in Oklahoma, unless filed; and, not being filed before the property was removed to the Indian Territory, it went there free of any lien as to creditors, and the subsequent filing in Oklahoma could create no lien upon it in a foreign jurisdiction." (See, also, *Sublett v. Hurst* (Tex. Civ.), 164 S. W. 448; *Ames Iron Works v. Warren*, 76 Ind. 512, 40 Am. Rep. 258.)

The exact date of the removal of the property to Idaho is not disclosed, but it appears from the cross-examination of respondent that he first met Ewing on Rock Creek (in Idaho) on the day before he traded for the mare and that Ewing told him he had been there about six weeks working on a ranch and that the mare had been in an alfalfa pasture there nearly a month.

J. P. May, manager of the collection department of appellant corporation, states in his deposition that Ewing and his wife, about August 1, 1913, visited his office, which is located in Salt Lake, and asked permission to take the wagon, harness and mare to Milford, Utah, which was refused. Further, that Mr. Ewing called again the next day and asked permission to sell the wagon and harness which was also denied. Mr. May further testified:

"August 11, 1913, Mrs. Ewing again came into my office and began to cry, stating excitedly that her husband had left Utah, taking what little money they had, as well as the mare and colt and harness and wagon. She said she thought he would sell everything and go, perhaps, to Australia, and wanted us to help find him."

For the lien of this mortgage to be effective against the rights of respondent, it is necessary that the property have been in Utah, not only when Hampton made his affidavit on August 8th, but when the mortgage was filed for record on August 12th. It was necessary that appellants prove this in order to bring themselves within the scope of the doctrine of comity between states. This they have failed to do, but

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the testimony above quoted tends strongly to indicate to the contrary.

In case of *Hare v. Young*, 26 Ida. 682, 146 Pac. 104, this court said:

"In order to invoke the doctrine of comity between states with respect to contracts, it is incumbent upon a party claiming such a benefit to show that his is such a contract as is contemplated by the doctrine. He must produce proof that the contract in behalf of which he seeks to invoke this rule is a foreign contract contemplated by the rule."

The judgment of the trial court is affirmed. Costs are awarded to respondent.

Budge, C. J., and Rice, J., concur.

(February 24, 1917.)

C. H. SWEETEN, Respondent, v. H. H. EZELL, Sheriff of
Oneida County, Idaho, Appellant.

[163 Pac. 612.]

SALE OF PERSONAL PROPERTY ON EXECUTION—DELIVERY OF POSSESSION—
CONFLICT OF EVIDENCE.

1. Sec. 3170, Rev. Codes, provides that "every transfer of personal property other than a thing in action, and every lien thereon, other than a mortgage when allowed by law, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession. . . . *Held*, that where A purchases, at an execution sale, hogs belonging to B, and sold thereat in partial satisfaction of a judgment against him, and he leaves them in B's possession paying him to care for them, sec. 3170 does not apply, and B's judgment creditors obtain no rights against A in respect to the hogs by reason of his failure to remove them from B's possession.

Opinion of the Court—Morgan, J.

2. An appellate court will not disturb the judgment of a trial court because of conflict in the evidence where there is sufficient proof, if uncontradicted, to sustain it.

[As to retention of possession of chattels by judgment debtor after sale of same, see note in 15 Am. Dec. 671.]

APPEAL from the District Court of the Fifth Judicial District, for Oneida County. Hon. J. J. Guheen, Judge.

Action for conversion of personal property and damages. Judgment for plaintiff. *Affirmed.*

T. E. Ray, for Appellant.

Davis & Evans, for Respondent.

Counsel cite no authorities.

MORGAN, J.—Respondent instituted this action to recover the value of 235 head of stock hogs, more or less, which, he alleged, appellant wrongfully took from his possession and sold and which he claims were his property at the time of the taking, together with damages and costs.

Appellant answered alleging that the property, at the time of the taking, belonged to Warren Sweeten, brother of respondent, and that he, the appellant, as sheriff of Oneida county, made the levy and sale under and by virtue of a writ of execution issued in an action wherein the Utah Association of Credit Men obtained a judgment against Warren Sweeten.

By stipulation the cause was tried by the judge without a jury and resulted in a judgment in favor of respondent for \$1,100, the value of the hogs, together with \$200 damages sustained as a result of the taking and selling, and costs of action.

Appellant moved for a new trial. His motion was denied and he has appealed from the judgment and from the order denying his motion.

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Two questions must be decided in order to determine this case, namely: Who was the owner of the 235 head of hogs sold by appellant, the respondent, or his brother, Warren Sweeten? If it is determined that respondent was the owner at the time of the levy and sale, was the amount of the judgment awarded by the trial court reasonable and proper?

We will briefly review the material evidence submitted upon the trial.

In substance, respondent introduced evidence to the effect that the Utah Association of Credit Men obtained a judgment for something over \$2,450 against Warren Sweeten and levied upon his personal property and that, at an execution sale held on May 5, 1915, said property, which consisted of about 275 head of hogs, was sold to respondent for \$1,500.

Respondent testified that immediately after the sale he took possession of the hogs and that thereafter he sold part of them and bought others which he placed with those remaining and that he hired his brother, Warren Sweeten, to help him in operating the farm, whereon they were kept and which formerly belonged to his brother, and in caring for the stock and that he paid him a salary of \$50 per month for his services. He further testified that although, at times, his brother bought and sold hogs, he did it as his, respondent's, agent.

In the suit of the Utah Association of Credit Men against Warren Sweeten, as above referred to, the judgment was only satisfied in part by the sale of the hogs which respondent purchased and a second writ of execution was issued and the hogs now claimed by him were levied upon and sold by appellant under and by virtue of this second writ.

Respondent further testified that the hogs sold under and by virtue of the second writ were made up, partly, of the stock he purchased at the former execution sale and partly of stock he bought, from time to time, since that sale.

Appellant introduced a taxpayer's statement, signed by respondent on May 7, 1915, stating that he possessed no hogs which were subject to assessment on the second Monday of January of that year, and a like statement, signed March 16,

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1915, by Warren Sweeten showing ownership by him of 40 hogs. Appellant contends these tax statements prove that the animals levied upon and sold belonged, at the time of the levy, not to respondent but to his brother, the judgment debtor named in the execution.

Appellant contends that the hogs never were in respondent's possession but have always been in the possession of his brother, Warren, and that there was neither a constructive nor actual delivery of the same to the respondent. He takes this position having in view, no doubt, sec. 3170, Rev. Codes, providing: "Every transfer of personal property, other than a thing in action, and every lien thereon, other than a mortgage, when allowed by law, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery and followed by an actual and continued change of possession of the thing transferred, to be fraudulent, and therefore void, as against those who are his creditors while he remains in possession. . . . "

If respondent had claimed the hogs in question by virtue of a sale from Warren Sweeten to himself and had left them in Warren's possession, then, according to the statute above cited, the *bona fides* of the transaction might well be questioned, but as respondent obtained his title, not through Warren Sweeten, but through a judicial sale made by the sheriff of Oneida county upon a writ of execution, the above cited statute does not apply.

There is no evidence to dispute the respondent's statement that he used his own money in the purchase of the hogs and that he purchased them for his own use and benefit, and that he also used his own money in purchasing hogs subsequent to that time and up to and including the time of the levy and sale by appellant, and though upon cross-examination respondent's memory was faulty, and he could not remember how many hogs were purchased or sold by him, or by his brother Warren upon his account, or for what prices, this was merely matter touching his credibility, and we cannot say

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that his vague statements and faulty memory in this respect show that his claims of ownership were false.

The taxpayer's statement made by Warren Sweeten conflicts with the testimony of respondent and so, in a measure, does that of respondent himself, but his explanation that he believed at the time he made the statement that these hogs would be assessed with the land upon which Warren lived, which was in another assessment district than the one wherein he resided, and that if he listed them there would be a double assessment, is reasonable, and there is no doubt that if he had mentioned them in his statement, they would have been twice assessed.

Considering the evidence, as a whole, on the question of ownership, we cannot say that, as a matter of law, the trial judge should have arrived at the conclusion that the hogs, at the time of the levy and sale by appellant, were the property of Warren Sweeten and not of respondent.

"An appellate court will not disturb the judgment of a trial court, because of conflict in the evidence, where there is sufficient proof, if uncontradicted, to sustain it." (*Darry v. Cox*, 28 Ida. 519, 155 Pac. 660, and cases therein cited.)

Appellant further contends that there is not sufficient proof to establish the value of the property at \$1,100, or the fact that respondent sustained damages in addition to its value in the sum of \$200. The respondent testified that he had been, for many years, engaged in the business of buying and selling hogs in the locality in which the stock in controversy was situated and that the reasonable value of the animals levied upon and sold by appellant was \$1,500. Respondent's father likewise qualified himself and testified to the same value. It was stipulated that the hogs so levied upon and sold were resold shortly afterward for \$1,000. The trial court found \$1,100 to be the reasonable value of the property. We cannot say this was excessive. At most there is a substantial conflict in the evidence in regard to value.

Respondent testified that, by reason of the wrongful taking and selling of his property, he lost time in going back and forth between his residence and Malad; that he lost pasture

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advantages; lost the advantage of "clearing around the threshing," and that when he put his damage in this respect at the sum of \$200 he "put it very light." Appellant offered no testimony whatever to refute respondent's claim in this respect, and we do not think the trial court erred in allowing the further sum of \$200 as compensation for the loss above mentioned.

The judgment and order appealed from are affirmed. Costs are awarded to respondent.

Budge, C. J., and Rice, J., concur.

(March 5, 1917.)

THE MODE, LTD., a Corporation, Respondent, v. SADA MYERS, Appellant.

[164 Pac. 91.]

TITLE TO REAL ESTATE—ADVERSE CLAIM—FRAUDULENT CONVEYANCES—
EXECUTION SALE—DEFECTIVE COMPLAINT.

1. An application to amend complaint while motion for nonsuit is pending is addressed to the sound discretion of the trial court.

2. A defective allegation of a good cause of action, in the absence of a demurrer, is cured by a verdict and judgment.

3. Where a judgment debtor causes real property which he has purchased to be conveyed by his vendor direct to a third person, and the transfer of his interest to such third person is fraudulent and void as to creditors, and the judgment creditor levies upon and sells such property as the property of the judgment debtor, the holder of the sheriff's deed on such sale may, under sec. 4538, Rev. Codes, maintain an action as owner to quiet title.

[As to when a general verdict causes defects in pleading, see note in 1 Am. Dec. 210.]

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Charles P. McCarthy, Judge.

Argument for Appellant.

Action to quiet title to real property. Judgment for plaintiff. *Affirmed.*

Smead, Elliott & Healy and W. A. Ricks, for Appellant.

"Where one purchases land and has the title made to his wife in fraud of creditors, it is deemed an equitable and not a legal asset. . . . The interest of the debtor in such case cannot be sold on execution at law." (*Robinson v. Springfield Co.*, 21 Fla. 203.)

Execution sale does not transfer title to real estate to which the debtor never had the legal title; where real estate is paid for by debtor, but conveyance made from third party to his wife to defraud creditors, execution does not vest title in creditors. His remedy is to obtain in equity a decree compelling the conveyance of the property, and not a suit to quiet based on a present claim of title. (*Dockray v. Mason*, 48 Me. 178; *Carlisle v. Tindall*, 49 Miss. 229; *Trask v. Green*, 9 Mich. 358.)

Execution sale does not pass any title where judgment debtor never owned the property. The debt should be made a lien against the property. This is the equitable rule. (*Haggerty v. Nixon*, 26 N. J. Eq. 42, 46.)

Purchaser gets no title in case of conveyance direct to some third party. Remedy is an action in equity in nature of creditor's bill, and to hold grantee as trustee for creditors. (*Everett v. Raby*, 104 N. C. 479, 17 Am. St. 685, 10 S. E. 526; *Garfield v. Hatmaker*, 15 N. Y. 475; *Hyde v. Chapman*, 33 Wis. 391; *Doe v. McKinney*, 5 Ala. 719; *Howe v. Bishop*, 3 Met. (44 Mass.) 26; *Blood v. Wood*, 1 Met. (42 Mass.) 528.)

Conveyance cannot be set aside unless the fraud complained of be alleged and proven. (*Kerns v. Washington Water Power Co.*, 24 Ida. 525, 135 Pac. 70; *Wilson v. Baker Clothing Co.*, 25 Ida. 378, 137 Pac. 896, 50 L. R. A., N. S., 239.)

In actions under sec. 4538 (Code Civ. Proc. 738), to quiet title, plaintiff must establish a legal, as distinguished from a mere equitable, title. (*Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29, 41 Pac. 1024; *Von Drachenfels v. Doolittle*, 77

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Cal. 295, 19 Pac. 518; *Nidever v. Ayers*, 83 Cal. 39, 23 Pac. 192; *Bryan v. Tormey*, 84 Cal. 126, 24 Pac. 319; *Harrigan v. Mowry*, 84 Cal. 456, 22 Pac. 658, 24 Pac. 48.)

Equitable title must be pleaded; if not evidence concerning the same is properly ignored. (*Reilly v. Wright*, 117 Cal. 77, 48 Pac. 970.)

Martin & Cameron, for Respondent.

Findings of fact by the court and judgment thereon based on evidence substantially conflicting will not be disturbed on appeal. (*Cartier v. Buck*, 9 Ida. 571, 75 Pac. 612; *Abbott v. Reedy*, 9 Ida. 577, 75 Pac. 764; *Cowden v. Mills*, 9 Ida. 626, 75 Pac. 766; *Heckman v. Espey*, 12 Ida. 755, 88 Pac. 80; *Salisbury v. Spofford*, 22 Ida. 393, 126 Pac. 400; *Huften v. Huften*, 25 Ida. 96, 136 Pac. 605.)

Amendments to pleadings rest largely in the discretion of the court, and rulings thereon by the trial court will not be disturbed on appeal, except it appear that the exercise of such discretion has deprived the party complaining of some substantial right. (*Palmer v. Utah & Northern R. Co.*, 2 Ida. 382, 16 Pac. 553; *Rankin v. Caldwell*, 15 Ida. 625, 99 Pac. 108; *Havlick v. Davidson*, 15 Ida. 787, 100 Pac. 91; *Mantle v. Jack Waite Min. Co.*, 24 Ida. 613, 135 Pac. 854, 136 Pac. 1130.)

Under sec. 4477, Rev. Codes, all beneficial estates in real estate are liable to be taken on execution irrespective of the question whether they are legal or equitable; it is the principle as well as the policy of the law to subject every species of property of the judgment debtor to payment of his debts, and no property is exempt except such as is specially exempted by law. (*Kennedy v. Nunan*, 52 Cal. 326; *Le Roy v. Dunkerly*, 54 Cal. 452; *Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am. Rep. 120.)

"Every estate or interest known to the law, whether legal or equitable, may be determined in an action of this kind." (*Coleman v. Jagers*, 12 Ida. 125, 118 Am. St. 207, 85 Pac. 894; *Shields v. Johnson*, 10 Ida. 476, 3 Ann. Cas. 245, 79 Pac. 391; *Johnson v. Hurst*, 10 Ida. 308, 77 Pac. 784; *Fry v. Sum-*

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mers, 4 Ida. 424, 39 Pac. 1118; *Clifton v. Herrick*, 16 Cal. App. 484, 117 Pac. 622.)

RICE, J.—This is an action to quiet title to lots 7, 8, 9 and 10, of block 29, Ellis Addition to Boise. The complaint alleged title to the property in the plaintiff, respondent here, and stated that the defendants, among whom was appellant, Sada Myers, claimed unfounded adverse interests therein. The answer of appellant Sada Myers denied title in the plaintiff and by way of cross-complaint alleged title in herself and prayed that her title be quieted. Both respondent and appellant derived title from Walter A. Myers, husband of the appellant. The respondent claims through sheriff's deed executed by virtue of a sale under an execution issued upon a judgment against Walter A. Myers. Appellant claims lots 7 and 8 through deeds of conveyance, and lots 9 and 10 through an assignment of a contract to her by Walter A. Myers and a subsequent conveyance under said contract by the Pierce Suburban Syndicate. Defendant Florence K. Fahrney answered, claiming an interest as an innocent purchaser of a portion of the property. It was stipulated that her interests should be protected and she is not interested in this appeal. The remaining defendants disclaimed any interest in the property.

At the trial, after the plaintiff had rested, the answering defendants moved for a judgment of nonsuit. The trial court permitted the plaintiff to amend its complaint, upon a showing of diligence, and a paragraph was added alleging fraudulent conveyance from the said Walter A. Myers to appellant Sada Myers.

Permission to amend upon the showing made by counsel for respondent, while motion for nonsuit was pending, is assigned as error. Under sec. 4229, Rev. Codes, the application was addressed to the sound discretion of the trial court, to be exercised, according to the admonition of the statute, in the furtherance of justice. (*Havlick v. Davidson*, 15 Ida. 787, 100 Pac. 91.) While the showing of diligence on the part of attorneys for respondent, as read from the record,

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is not very persuasive, we do not think the trial court abused its discretion in permitting the amendment. This is particularly true in view of the offer of the court to continue the case, should the appellant claim surprise and desire further time in which to present her defense. (*Lorang v. Randall*, 27 Ida. 259, 148 Pac. 468.)

The amendment to the complaint reads as follows:

"That the defendant Walter A. Myers has made fraudulent conveyances to the defendant Sada Myers by which said defendant Sada Myers claims some interest, right, or title in and to the lots in controversy herein described, in this: that said Walter A. Myers was insolvent and while so insolvent made conveyances without consideration of his property, the property in question herein with intent to hinder, delay and defraud his creditors, and especially the plaintiff creditor in this action. And at the time the defendant Walter A. Myers did cause to be made this pretended conveyance without consideration, and said defendant Walter A. Myers knew he was insolvent and had sworn less than a month prior to this pretended conveyance without consideration that he had no property out of which the plaintiff creditor could satisfy its judgment. That at the time said conveyance of the property in controversy was pretended to be dated and made by Walter A. Myers to Sada Myers, his wife, said Walter A. Myers had no other property other than this property in question whatever out of which this plaintiff creditor could satisfy his said indebtedness."

The allegation would be entirely insufficient if it were challenged by demurrer, but in the absence of a demurrer such defective statement of a cause of action is cured by a verdict, or findings and judgment. (*Salmon Falls Bank v. Leyser*, 116 Mo. 51, 22 S. W. 504; *San Francisco v. Pennie*, 93 Cal. 465, 29 Pac. 66; *Larkin v. Mullen*, 128 Cal. 449, 60 Pac. 1091.)

"After judgment the rule by which pleadings before judgment are construed most strongly against the pleader is reversed, and the pleading upon which the judgment is based is liberally construed for the purpose of sustaining the judgment." (*Plew v. Board*, 274 Ill. 232, 113 N. E. 603.)

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In this case it was shown that the defendant W. A. Myers was a judgment debtor of the respondent; that while so indebted, without consideration, he executed a conveyance of two of the lots in question to appellant, Sada Myers, and caused to be executed a conveyance of the remaining two lots in question to appellant; that at the time of such conveyances W. A. Myers was insolvent. Appellant offered testimony tending to show that the conveyance to her of the two lots was intended to take the place of a former deed of conveyance made by W. A. Myers prior to the time he was indebted to the respondent, which former conveyance had been lost, and that the assignment of the contract for the conveyance of the remaining two lots was also made by W. A. Myers prior to any indebtedness to the respondent, and that such original conveyance and assignment were made in consideration of her approaching marriage to W. A. Myers.

After weighing the conflicting evidence the trial judge found that the said conveyances by W. A. Myers to appellant were made without consideration and with intent to hinder, delay and defraud his creditors, of whom respondent was one. The trial court without doubt recognized the rule that where fraud is charged as a basis of recovery the proof must be clear and convincing. Under that rule there was substantial evidence to support the findings of the court and the judgment based thereon.

Appellant also contends that respondent cannot maintain an action to quiet title to lots 9 and 10, the basis for this contention being that these lots were conveyed by the Pierce Suburban Syndicate direct to appellant, Sada Myers, and that respondent's claim of title, being based upon a sheriff's deed, is not, as a matter of law, well founded, and that an action to quiet title is not the proper remedy.

Sec. 4477, Rev. Codes, provides that any interest in real or personal property of the judgment debtor, not exempt by law, is liable to execution.

In the case of *Clifton v. Herrick*, 16 Cal. App. 484, 117 Pac. 622, it was held that under the California Civ. Code, sec. 3439, declaring a transfer of property with intent to defraud

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a creditor, void against the creditor, a judgment debtor having bought property with her separate funds and taken title in the name of her daughter with intent to defraud the judgment creditor, such creditor could levy on and sell the property as that of the judgment debtor.

This action is brought under the provisions of sec. 4538, Rev. Codes. In the case of *Coleman v. Jagers*, 12 Ida. 125, 118 Am. St. 207, 85 Pac. 894, the court held the provisions of said section to be very broad, and that under them any person whether in possession or out of possession, whether holding the legal or equitable title, might bring an action against another who claims an estate in real property adverse to him, and in such action might have the adverse claim determined and settled.

No issue of possession or right of possession is involved in this case. Under the construction of sec. 4538, given above, respondent had the right to levy upon and sell any interest its judgment debtor might have in the two lots in question, and, upon becoming the purchaser thereof, could bring an action to quiet title. The judgment of the district court is affirmed. Costs awarded to respondent.

Budge, C. J., and Morgan, J., concur.

(April 14, 1917.)

ON PETITION FOR REHEARING.

RICE, J.—Appellant has filed a petition for rehearing in this case, and raises therein questions which require consideration. There can be no doubt but that a party has the right to test the sufficiency of an amendment to a pleading when offered during the progress of the trial, to the same extent as though the amendment were made before trial. He may demur in some instances, or he may raise the question of the sufficiency of the amendment by objections to the allowance thereof, and such objections have the same force and effect as if the questions were presented by demurrer.

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In this case the objection was "that the amendment as submitted is a statement of evidence or evidential facts, upon which the plaintiff will rely, rather than the ultimate facts involved." This objection was not specific in pointing out wherein the amendment was unintelligible or uncertain. We think the trial court did not err in permitting the amendment to be made over this objection.

Appellant also objected to the reception of any evidence in support of the amendment. This objection raises the question as to whether the amendment states a cause of action, and in effect raises the same question discussed in the original opinion. In considering such objection every reasonable intendment will be indulged in favor of the pleading.

Sec. 4207, Rev. Codes, provides: "In the construction of a pleading for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice between the parties." In *McCormick v. Smith*, 23 Ida. 487, 130 Pac. 999, this court said: "A pleading should be construed so as to allege all facts that can be implied by a fair and reasonable intendment from the facts expressly stated." Where a material fact is only stated inferentially, and the pleading is not properly demurred to specially for this reason, it is good after judgment. (*Hill v. Haskin*, 51 Cal. 175; *Estate of Behrens*, 130 Cal. 416, 62 Pac. 603; *Whitehurst v. Stuart*, 129 Cal. 194, 61 Pac. 963; *Chambers v. Hoover*, 3 Wash. Ter. 107, 13 Pac. 466; *Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673; *Silver Bow County v. Davies*, 40 Mont. 418, 107 Pac. 81.)

In holding that the action to quiet title under the statute was a proper action in this case, we meant it to be understood that the court having found that the transfer made by W. A. Myers of his interest in lots 9 and 10 to Sada Myers was void as to creditors, and the respondent having levied upon and sold the property as that of the judgment debtor, W. A. Myers, the respondent could plead title to the lots in question as against the appellant Sada Myers, and the court properly decreed that the respondent was the owner of the property. The appellant had nothing but the naked legal title without

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beneficial interest in the property. This, in substance, was the course pursued in the case of *Coleman v. Jagers*, 12 Ida. 125, 118 Am. St. 207, 85 Pac. 894, and approved by this court.

The other matters urged in the petition for rehearing were considered by the court, although not discussed. The petition is denied.

(March 8, 1917.)

JAMES S. AUSTIN, Respondent, v. BROWN BROTHERS COMPANY, a Corporation, Appellant.

[164 Pac. 95.]

CONTRACTS—SEPARABLE CONTRACTS—EVIDENCE—SUBSTANTIAL PERFORMANCE—PLEADINGS—QUALIFICATION OF EXPERTS.

1. Under sec. 4201, Rev. Codes, the failure to deny a written instrument contained in the answer as therein required admits the genuineness and due execution of such instrument, but the plaintiff is not precluded thereby from taking any position in avoidance of the contract which is not inconsistent with the admission of its genuineness and due execution.

2. Where three persons gave individual orders complete in themselves for nursery stock to an agent of a nursery company, and thereupon, at the suggestion of the agent, the three orders were combined in one and signed by one of the three, *held*, that under the facts of this case the combined order became a separable contract.

3. Where a contract for the sale of fruit trees, prepared by the seller to be signed by the buyer contains a provision that "any stock which does not prove to be true to name as labeled is to be replaced free or purchase price refunded," such contract contains an implied condition precedent requiring a substantial performance by the seller, for the breach of which the buyer is entitled to compensatory damages, and the foregoing provision of the contract applies only to such mistakes as are liable to occur in the substantial performance of the contract.

4. Where by the undisputed testimony there is clearly a substantial failure of performance on the part of one of the parties to the contract, it is the duty of the court so to declare as a matter of law.

Argument for Appellant.

5. A judgment will not be reversed where it appears that the jury took cognizance only of matters proper for their consideration, even though the jury was erroneously instructed.

6. Qualification of witnesses to testify as experts must be determined in the first instance by the trial court, and unless it is apparent that the trial court was in error in permitting a witness to testify as an expert, the judgment will not be reversed.

7. An instruction should not be given unless founded on the issues in the case or evidence received at the trial. But where, by examination of instructions given in the trial, it appears that the giving of such instruction did not result in any substantial injury to appellant, the judgment will not be reversed.

[As to qualification of witness to testify as expert as resting in the discretion of the trial court, see note in *Ann. Cas.* 1912D, 817.]

APPEAL from the District Court of the Fourth Judicial District, for Twin Falls County. Hon. Chas. O. Stockslager, Judge.

Action for breach of contract. Judgment for plaintiff. *Affirmed.*

Longley & Walters, for Appellant.

This being the contract between the parties, it was error for the court to permit testimony to be offered, either of prior negotiations or of the contract offered as Exhibit "A." (*Jacobs v. Shenon*, 3 Ida. 274, 29 Pac. 44; *Idaho Fruit Land Co. v. Great Western Beet Sugar Co.*, 18 Ida. 1, 107 Pac. 989; *Newmyer v. Roush*, 21 Ida. 106, *Ann. Cas.* 1913D, 433, 120 Pac. 464.)

"Where the written sale contains no warranty, or expresses the warranty that is given by the vendor, parol evidence is inadmissible to prove the existence of a warranty in the former case, or to extend it in the latter, by inference or implication." (Benj. on Sales, sec. 942; 1 Elliott on Evidence, sec. 580; *Mast v. Pearce*, 58 Iowa, 579, 43 Am. Rep. 125, 8 N. W. 632, 12 N. W. 597.)

"An instruction defining an abstract proposition of law, where there is no evidence in the case to which such instruction is applicable, only serves to befog and mislead the jury

Argument for Respondent.

and should not be given." (*Gwin v. Gwin*, 5 Ida. 271, 48 Pac. 295; *Calkins' Estate*, 112 Cal. 296, 44 Pac. 577.)

The contract must not be construed to defeat the intention of the parties; but effect must be given to all the provisions and parts of the contract, and no part should be rejected unless absolutely repugnant to the general intent. (*Sinclair & Co. v. National Surety Co.*, 132 Iowa, 549, 107 N. W. 184; *Smith v. Durkee*, 116 Mich. 484, 131 N. W. 1116; *Chicago, B. & Q. R. Co. v. Bartlett*, 20 Ill. 603, 11 N. E. 867.)

Where parties have made their contract it is the duty of the court to enforce it, as they have elected to make it, without regard to the fact that in the light of subsequent events a hardship may be worked. (*Murphy v. Russell & Co.*, 8 Ida. 133, 67 Pac. 421; *Norcross v. Wills*, 198 N. Y. 336, 91 N. E. 803.)

Babcock & Graham and E. M. Wolfe, for Respondent.

Exhibit "A" was not offered for the purpose of proving the contract between respondent and appellant, but simply to explain the method used by appellant's agent to secure the contract upon which suit was brought.

The instructions plainly show that the jury were advised to consider the contract pleaded in the answer as the contract upon which the suit was brought. (*Martin v. Dowd*, 8 Ida. 453, 69 Pac. 276.)

The defendant cannot be heard to complain of the verdict of the jury and cannot have it set aside, if the verdict was arrived at by the jury upon a proper consideration of a proper measure of damages, even though they do disregard the instruction of the court in so doing. (*Tarr v. Oregon Short Line R. Co.*, 14 Ida. 192, 125 Am. St. 151, 93 Pac. 957.)

There was not a substantial compliance with the contract, and especially when the variety of trees delivered to the plaintiff were of a wholly worthless kind, having no market value whatever. (*Sanford v. Brown Bros. Co.*, 134 App. Div. 652, 119 N. Y. Supp. 333; *Grisinger v. Hubbard*, 21 Ida. 469, Ann. Cas. 1913E, 87, 122 Pac. 853; *State v. Pioneer Nurseries Co.*, 26 Ida. 332, 143 Pac. 405.)

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RICE, J.—In June, 1905, the plaintiff and respondent executed an order to the defendant and appellant to furnish him with 500 apple trees, together with 45 pear, cherry, peach and plum trees, the variety of trees to be furnished and the prices to be paid therefor being fully set out. At the same time and place, respondent's brother and brother-in-law executed orders for various amounts of nursery stock, the exact number of trees ordered by them being not material in this case. Upon the execution of these orders it was suggested by appellant's agent that for convenience in shipping and in buying the trees a combined order should be made and the three orders shipped in one. The combined order was thereupon prepared and signed by respondent. The combined order differed from the original order executed by the respondent, in that it contained the following provision which the original order did not contain: "Any stock which does not prove to be true to name as labeled is to be replaced free or purchase price refunded; and all stock to be delivered in a thrifty and healthy condition."

The trees were delivered at Twin Falls in the spring of 1906. They were taken to the premises of the respondent and there divided among the three parties, each taking the trees that he had ordered. The trees arrived labeled so as to indicate the variety and number of trees. Respondent planted his trees in the spring of 1906 on his premises, consisting of a forty-acre subdivision, and cared for them until about April, 1910, when he discovered that a large part of the trees so planted and cared for by him were not true to name. Among the 500 trees ordered by him were 300 Jonathan and 130 Rome Beauty trees. No Jonathan or Rome Beauty trees were received, but instead the trees proved to be Wolf River, Peewaukees and an unknown variety. Respondent brought suit against the appellant to recover damages suffered as a result of the breach of the contract. The case was tried to a jury and a verdict was rendered in favor of respondent in the sum of \$1,500.

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The appellant assigns twenty-six specifications of error as ground for reversing the judgment, but relies principally upon those hereinafter considered.

Appellant in its answer set out a copy of the combined order claiming that said order constituted the contract between the parties. At the beginning of the trial the court, over the objection of appellant, permitted respondent to introduce his individual order. The specific objection was that the order was not the same as the order signed by the respondent in this action, as set forth in the answer, and inasmuch as there was no denial of the order as required by the statute it was admitted to have been the order made by the defendant. Sec. 4201, Rev. Codes, reads as follows: "When the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant." It is admitted that no affidavit denying the combined order was filed or served on appellant. The genuineness and due execution of the contract alleged in the answer was therefore admitted.

In the case of *Cox v. Northwestern Stage Co.*, 1 Ida. 376, this court held that due execution of an instrument of writing goes to the manner and form of its execution by persons competent to execute it according to the laws and customs of the country where executed. The genuineness of an instrument in writing goes to the question of its having been an act of the party, just as represented; or, in other words, that the signature is not spurious, and that nothing has been added to or taken from it, which would lay the party signing or changing the instrument liable for forgery.

It does not follow that by admitting the genuineness and due execution of the instrument pleaded in the answer the respondent admitted that such instrument was the contract between the parties, nor was the respondent precluded thereby from taking any other position in avoidance of the effect of the contract which is not inconsistent with the admission of

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its genuineness and due execution. (*Cox v. Northwestern Stage Co.*, *supra*; *Martin v. Dowd*, 8 Ida. 453, 69 Pac. 276; *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630; *Brooks v. Johnson*, 122 Cal. 569, 55 Pac. 423.)

The individual order and the combined order are parts of one transaction and should be considered together, but the plaintiff could not be relieved of any obligation or provision contained in the joint order, which was the last one signed. The difference between them is material only in view of the fact that the combined order contained the provision, quoted above, which was not in the individual order.

In the case of *Sanford v. Brown Bros. Co.*, 134 App. Div. 652, 119 N. Y. Supp. 333, a contract for nursery stock containing this provision was construed. In considering the contract that court laid down the three following propositions:

First: Where a contract for the sale of fruit trees is prepared by the seller to be signed by the buyer, any uncertainty or ambiguity therein is to be resolved in favor of the buyer.

Second: That such a contract for the sale of nursery stock contained an implied condition precedent requiring a substantial performance by the seller, for breach of which the buyer was entitled to recover compensatory damages.

Third: That the provision of the contract quoted above applied only to such mistakes as were liable to occur in the substantial performance of the contract, and unless there was a substantial performance, the plaintiff's recovery for breach was not limited to the price of the trees not delivered.

In view of the foregoing construction of this contract, which appears to be correct, it was necessary to determine whether or not there had been a substantial compliance with the contract by the appellant, for if it failed substantially to fulfil its contract, the rule of damages in the case of breach of the individual order and the combination order would be the same.

It seems that the trial court attempted to submit to the jury the question as to substantial compliance with the order

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upon the part of appellant by giving the following instruction:

“The jury are instructed that if you find from the evidence that the defendant company failed to substantially perform its contract by delivering to the plaintiff the trees that were ordered or trees of a quality and variety equally as good as those ordered, then your verdict must be for the plaintiff. By substantial performance is meant not a strict literal performance of the contract by delivering the exact number of each variety and kind of trees, but a reasonable compliance with the contract as to varieties, with such mistakes as were liable to occur, considering the size of the order and delivery.”

The appellant contends that this instruction is faulty in that it does not inform the jury of their duty in case they found there was a substantial compliance, and might be construed by the jury as tantamount to an instruction that there was not a substantial compliance. We think, however, that the instruction, under the facts of this case, did not operate to deprive the appellant of any substantial right.

Ordinarily the question of whether there has been a substantial compliance with a contract is a question to be submitted to the jury, but under certain circumstances the court should declare as a matter of law that there has been a failure of substantial performance.

In the case of *Pressy v. McCornack*, 235 Pa. St. 443, 84 Atl. 427, the court said:

“There must in every case be substantial performance of the contract, and unless there be substantial compliance, there can be no recovery; but, whether there has been substantial performance, depends upon the character of the changes or alterations complained of, that is to say, do they materially affect the completed structure and were they in good faith honestly intended to fulfil the contract? Whether the party acted in good faith, and whether the departures were material are generally questions for the jury: *Truesdale v. Watts*, 12 Pa. St. 73; *Pallman v. Smith*, 135 Pa. St. 188, 19 Atl. 891; *Cosgrove v. Cummings*, 190 Pa. St. 525, 42 Atl. 881. This is

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always true if the facts relating to the good faith of the plaintiff and the materiality of the changes or alterations are in dispute. On the other hand, if the undisputed testimony shows a substantial variance, not authorized by the owner, and made without his knowledge or assent, it is the duty of the court to so declare as a matter of law: *Harris v. Sharples*, 202 Pa. St. 243, 51 Atl. 965, 58 L. R. A. 214."

In construing building contracts the New York courts have held that where there is clearly a substantial failure of performance on the part of the contractor, it is the duty of the court so to declare as a matter of law. (*Gompert v. Healy*, 149 App. Div. 198, 133 N. Y. Supp. 689; *Ketchum v. Herrington*, 63 Hun, 636, 18 N. Y. Supp. 429; *Glacius v. Black*, 67 N. Y. 563; *Spence v. Ham*, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238.)

The reasoning of the court in the Sanford case, *supra*, may be considered in relation to the question of performance. In that case the court said:

"It may be safely assumed that no man in his senses would purchase 3,500 peach trees and agree that he would be content with the return of the purchase price, if it should turn out, after three or four years of culture, that they were substantially all worthless, and not what he ordered."

The appellant had knowledge of the portion of the combined order that was intended for the respondent. The combined order and shipment was made at the request of appellant and presumably for its convenience. The combined order, therefore, was separable, and it is proper to consider the individual order in determining the question of substantial compliance on the part of appellant. (*Wilson-Case Lumber Co. v. Mountain Timber Co.*, 202 Fed. 305.)

The testimony is undisputed that of the 300 Jonathan and 130 Rome Beauty trees ordered, none were delivered, and that only 70 of the 500 apple trees ordered were true to name. No complaint was made as to the delivery of the pear, cherry, peach or plum trees. In view of the foregoing facts, there was not a substantial compliance with the contract on the part of the appellant.

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No error was committed, therefore, in the introduction of the individual contract in evidence.

The second error assigned by appellant is that the court admitted evidence upon an erroneous theory of the measure of damages. It seems to be the theory of appellant that the damage must be limited to the land actually occupied by the orchard, the error assigned being the admission of evidence as to the damage to the forty acres upon which the orchard, which occupied 7.77 acres, was planted.

In the same connection the appellant complains that the court in instructing the jury adopted the same erroneous view as to the proper measure of damages. The court instructed the jury as follows:

“The jury are instructed that the damages plaintiff is entitled to in this case, if you find from the evidence that he is entitled to any, is the difference in the reasonable cash value of the forty acres in question at the time that the plaintiff discovered that the said fruit trees were not true to name, or at such time as he, the plaintiff, by the exercise of ordinary care and attention might have discovered that fact, with the trees true to name, and the reasonable cash value of the same forty acres of land at the same time with the fruit trees thereon as they actually existed, that is, with the trees not true to name, if you so find from the evidence, together with interest on said sum at seven per cent per annum from the commencement of this action, to wit, August 27, 1912. In other words, the measure of damages is the value that would have been added to the premises, at the time of the discovery of the mistake by the plaintiff or at such time as he, the plaintiff, by the exercise of ordinary care and attention might have discovered that fact, if the trees had been of the varieties as ordered by the plaintiff.”

In this case, however, special questions were submitted to the jury, which questions and their answers are as follows:

“1. What do you find the value of the acreage embraced within such orchard to have been had the trees been planted as contained in the order and the contract of the plaintiff, such value to be determined on or about April, 1910?”

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“We find the value of the ten acres to have been on the above date, \$3,900.

“D. P. ALBEE, Foreman.”

“2. What do you find the value of the acreage embraced in the orchard to have been on or about April, 1910, in the condition in which it was at such time?

“We find the value of the ten acres, including the improvements, to have been \$2,400.

“D. P. ALBEE, Foreman.”

The general verdict of the jury was for the plaintiff in the sum of \$1,500.

It thus appears that the jury took into consideration only the ten acres upon which the orchard was planted in arriving at their verdict. The appellant cannot complain that the jury considered the ten-acre tract instead of the 7.77 acres upon which it claims the trees were actually planted. The 2.23 acres making up the ten acres were occupied by the dwelling-house and buildings of respondent, and were so situated that manifestly it would be impracticable to consider the 7.77 acres alone. Conceding appellant's theory to be correct, it was not injured by the evidence received or instruction given.

In this state a judgment will not be reversed where it appears that the jury took cognizance only of matters proper for their consideration, even though erroneously instructed. (*Tarr v. Oregon Short Line R. Co.*, 14 Ida. 192, 125 Am. St. 151, 93 Pac. 957.)

The appellant also assigns as error the action of the court in admitting evidence, over objections, as to the value of improvements upon the forty acres aside from the orchard.

As the value of the improvements was the same whether the trees in the orchard were true to name or otherwise, we think the admission of the testimony was harmless.

Appellant assigns as error the admission of answers to certain hypothetical questions propounded to witnesses, on the ground that the questions did not include all elements proven in the case and which necessarily should have been included before the questions could be properly answered. Subsequently, however, the omitted elements were supplied, in sub-

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stance, and the erroneous admission of the answers was thereby cured.

Appellant also complains that two witnesses were permitted to give opinion testimony without showing proper qualifications as experts.

In the case of *Carscallen v. Coeur d'Alene etc. Transp. Co.*, 15 Ida. 444, 16 Ann. Cas. 544, 98 Pac. 622, this court said:

"No very nice distinction has ever been drawn or fixed rule established by which a trial judge shall determine the exact amount of knowledge, experience and skill a so-called expert shall have before permitting him to testify before the jury. That question must be determined in the first instance by the court. After the evidence is in, its weight and credibility is to be judged solely by the jury, and they will give it such weight as they think it is entitled to, and, indeed, if it runs counter to their convictions of truth in the exercise of their own knowledge and judgment, they may disregard it entirely."

It does not appear, in view of the foregoing expression, that error was committed in permitting the witnesses to testify as experts.

Appellant also assigns as error the instruction of the court, quoted above, to the effect that the jury might give plaintiff interest from the date of the commencement of the action.

This being an action for unliquidated damages, the instruction given was erroneous (*Barrett v. Northern Pac. R. Co.*, 29 Ida. 139, 157 Pac. 1016); but in view of the fact that the answers to the special questions submitted to the jury show that this instruction was disregarded, the judgment will not be reversed on account of such error.

The appellant also assigns as error the giving of the following instruction to the jury:

"The jury are instructed that under the pleadings in this case it stands admitted that the defendant company is a foreign corporation and that it failed to comply with the statutes of the state of Idaho in regard to designating an agent in this state upon whom service of summons could be made

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in this state, and having thus failed to do so, the said defendant is not entitled to urge the defense of the statute of limitations in this case."

At the opening of the trial the court had denied appellant's motion to amend its answer, so as to plead the statute of limitations. The instruction was gratuitous, in that the statute of limitations was not in issue, nor was any evidence introduced by the appellant tending to show that the cause of action was barred by the statute. The second paragraph of the complaint contained the allegation that the defendant was a foreign corporation and that during all times mentioned in the complaint it had been and now is doing and carrying on business within the state, and that it had neglected to comply with the statutory requirements with reference to foreign corporations doing business within the state. This allegation is expressly admitted by the answer. The instruction therefore correctly stated the law, if the question involved had been an issue in the case. The instruction should not have been given, but in view of the other instructions given by the court, it is apparent that no substantial injury was done to the appellant.

All specifications of error on the part of appellant have been examined, but it appears that the errors committed by the trial court resulted in no substantial injury to appellant.

The judgment of the lower court will be affirmed. Costs awarded to respondent.

Budge, C. J., and Morgan, J., concur.

Petition for rehearing denied.

Argument for Appellant.

(March 8, 1917.)

W. W. HUFFAKER, Appellant, v. GEORGE W. EDGINGTON, Respondent.

[163 Pac. 793.]

CONTESTED ELECTIONS—CONFLICT IN EVIDENCE—BURDEN OF PROOF—
DUTIES OF ELECTION OFFICERS.

1. The findings of fact of the district court in contested election cases will not be set aside by the supreme court where there is a substantial conflict in the evidence and such findings are supported by competent evidence.

2. The burden rests upon the party contesting an election to show that enough illegal votes were cast, or legal votes rejected, to change the result of the election, or that such serious wrong or fraud existed as to make the result of the election doubtful, in order to justify the court in setting aside the certificate of the canvassing board.

3. Laws prescribing the duties of the election officers are directed primarily to such officers, and their failure to comply with such laws relative to registering voters who comply with the law so far as required of them should not be construed so as to defeat the right of citizens to vote, unless the failure to strictly comply with such laws makes the result of the election doubtful.

[As to statutory remedy for contest of election as being exclusive, see notes in *Ann. Cas.* 1913E, 982; *Ann. Cas.* 1914D, 274.]

APPEAL from the District Court of the Ninth Judicial District, for Bonneville County. Hon. James G. Gwinn, Judge.

Action to contest election of mayor of Idaho Falls. Judgment for contestee. *Affirmed.*

William P. Hanson, for Appellant.

A succession of unexplained irregularities and a disregard on the part of the officials is sufficient to deprive the ballot-box and the return to the credit to which they are entitled, and shifts the burden upon the party maintaining the legality of the official count. (McCrary on Elections, secs. 497, 582.)

Argument for Appellant.

Where fraud and irregularities occur in the conduct of election to such an extent that it is impossible for the court to separate, with reasonable certainty, the legal from the illegal votes, the precinct should be excluded. (*Vigil v. Garcia*, 36 Colo. 430, 87 Pac. 543; *Tebbe v. Smith*, 108 Cal. 101, 49 Am. St. 68, 41 Pac. 454, 29 L. R. A. 673.)

Some responsibility is placed upon the voter. (*Sweeney v. Hjul*, 23 Nev. 409, 48 Pac. 1036, 49 Pac. 169.)

Where registration is required by law and election held without the voters being registered, as required by law, the election is invalid, and a person who is not registered as is required by law is not a qualified voter, and not entitled to vote. (*In re McDonough*, 105 Pa. St. 488; *In re Election of School Directors*, 18 Phila. (Pa.) 458; *State v. Hilmantel*, 21 Wis. 566; *Zeiler v. Chapman*, 54 Mo. 502; *Patterson v. Hanley*, 136 Cal. 265, 68 Pac. 821, 975.)

A number of the statutory provisions are held to be directory only, and not mandatory. However, if they affect the merits of the election, they will be held to be mandatory. (*Harrison v. Stroud*, 129 Ky. 193, 16 Ann. Cas. 1050, 110 S. W. 828; *Parvin v. Wimberg*, 130 Ind. 561, 30 Am. St. 254, 30 N. E. 790, 15 L. R. A. 775; *Bowers v. Smith*, 111 Mo. 45, 33 Am. St. 491, 20 S. W. 101, 16 L. R. A. 754; *State v. Board of Canvassers*, 78 S. C. 461, 13 Ann. Cas. 1133, 59 S. E. 145, 14 L. R. A., N. S., 850; note to 83 Am. Dec. 49.)

"Mere irregularities or mistakes on the part of the election officers, if they do not affect the results of the election, will be disregarded, but where the mistakes or irregularities on the part of the judges are so flagrant that the results are doubtful, they cannot be disregarded." (*Peabody v. Burch*, 75 Kan. 543, 12 Ann. Cas. 719, 89 Pac. 1016; *People v. Bates*, 11 Mich. 362, 83 Am. Dec. 745; *Heyfron v. Mahoney*, 9 Mont. 497, 18 Am. St. 757, 24 Pac. 93; *Stackpole v. Hallahan*, 16 Mont. 40, 40 Pac. 80, 28 L. R. A. 502; *Blackwell v. Newkirk*, 31 Okl. 304, Ann. Cas. 1913E, 441, 121 Pac. 260; *Tuntland v. Noble*, 30 S. D. 145, Ann. Cas. 1915A, 1004, 138 N. W. 291.)

"In an election contest where irregularities are shown, the person claiming that legal votes were cast for him has the

Argument for Respondent.

burden of proving this fact.” (*Lloyd v. Sullivan*, 9 Mont. 577, 24 Pac. 218; *Payne on Elections*, sec. 592; *Heyfron v. Mahoney*, 9 Mont. 497, 18 Am. St. 757, 24 Pac. 93; *McCrary on Elections*, secs. 596, 539.)

“Persons attempting to uphold irregularities on the part of those conducting an election have the burden of proof that such conduct did not affect the results.” (*People v. Larkspur*, 16 Cal. App. 169, 116 Pac. 702, 706; *Town of Ryan v. Town of Waurika*, 29 Okl. 655, 119 Pac. 220.)

“Where such a number of persons voted in violation of law that the results are placed in doubt, the court should annul the election.” (*Harrison v. Stroud*, 129 Ky. 193, 16 Ann. Cas. 1050, 110 S. W. 828.)

Any action of a canvassing board adjourned without date is a nullity. Their power and duties as a canvassing board ceased after they had canvassed the vote and published the returns. (15 Cyc. 383, and cases cited; *Rosenthal v. State Board of Canvassers*, 50 Kan. 129, 32 Pac. 129, 19 L. R. A. 157.)

Where there is a conflict between the certificate returned by the election officers and the tally-sheet, the election certificate controls. (*People v. Tool*, 35 Colo. 225, 117 Am. St. 198, 87 Pac. 224, 229, 231, 6 L. R. A., N. S., 822; *State v. McFadden*, 46 Neb. 668, 65 N. W. 800; *State v. Eastman*, 46 Neb. 675, 65 N. W. 805.)

Phil. Averitt, B. J. Briggs and Herbert Reeves, for Respondent.

Neither the ignorance, neglect, fraud or corruption of an election officer will be allowed of itself to disfranchise the citizen, and neither will failure to observe the provisions of a directory statute be permitted to avoid the election, unless coupled with actual fraud, except where it prevents casting of legal votes, and if the fraud should consist in the reception of illegal votes, it will not then be permitted, no matter what its degree, to avoid the election, if it is possible for the court to purge the polls of the illegal votes cast. (*Vigil v. Garcia*, 36 Colo. 430, 87 Pac. 543; *Lehman v. Pettingell*, 39 Colo. 258,

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89 Pac. 48; *Packwood v. Brownell*, 121 Cal. 478, 53 Pac. 1079; *People v. Earl*, 42 Colo. 238, 94 Pac. 294; *Stinson v. Sweeney*, 17 Nev. 309, 30 Pac. 997.)

The wrong of the officers cannot be visited upon the electors, so as to deprive them of the right of suffrage, where the electors themselves have not been parties to the wrong. (*McCrane v. County of Nez Perce*, 18 Ida. 714, Ann. Cas. 1912A, 165, 112 Pac. 312, 32 L. R. A., N. S., 730.)

No irregular or improper conduct in the proceedings of the judges is such malconduct as avoids an election, unless it is such as to procure the person whose right to the office is contested to be declared elected, when he had not received the highest number of legal votes. (*State ex rel. McMillan v. Sadler*, 25 Nev. 131, 83 Am. St. 573, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128; *Heyfron v. Mahoney*, 9 Mont. 497, 18 Am. St. 757, 24 Pac. 93; *Wells v. Taylor*, 5 Mont. 202, 3 Pac. 255; *State v. Fawcett*, 17 Wash. 188, 49 Pac. 346; *Russell v. McDowell*, 83 Cal. 70, 23 Pac. 183; *People v. Earl*, 42 Colo. 238, 94 Pac. 294; *Lane v. Bailey*, 29 Mont. 548, 75 Pac. 191; *Quinn v. Lattimore*, 120 N. C. 426, 58 Am. St. 797, 26 S. E. 638; *People v. Wood*, 148 N. Y. 142, 42 N. E. 536; *Moyer v. Van De Vanter*, 12 Wash. 377, 50 Am. St. 900, 41 Pac. 60, 29 L. R. A. 670; *Bowers v. Smith*, 111 Mo. 45, 33 Am. St. 491, 20 S. W. 101, 16 L. R. A. 754.)

The burden of proof is upon contestor to sustain by a preponderance of the evidence the material averments of his petition. (*Savard v. Herbert*, 1 Colo. App. 445, 29 Pac. 461; *Tarbox v. Sughrue*, 36 Kan. 225, 12 Pac. 935; *McCrary on Elections*, sec. 466a.)

DAVIS, District Judge.—This is an action to test the legality of the election of the mayor of Idaho Falls.

The contestant, appellant in this court, assigns numerous errors of the district court, which may be grouped under four general heads, as follows:

That the court erred in not finding that there were more illegal votes cast.

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In not imposing the burden upon the party claiming the benefit of the votes as cast to show the legality thereof, after it was shown that there was irregularities in the registration of voters and in the conduct of the election officers.

In finding that wherein the election officers failed to fully perform their duties nothing was done or omitted with any sinister purpose or fraudulent intent.

And in holding that the irregularities and misconduct on the part of the officers of election in the first ward did not amount to actual fraud so as to affect the returns from that precinct.

The district court found that there were 909 votes cast for Edgington and 900 for Clark, and after deducting seven illegal votes cast for Edgington, he received 902 votes, and after deducting four illegal votes cast for Clark, he received 896 votes, thus giving the election to Edgington by a majority of six votes.

It is admitted that David Clark, who voted for Edgington, was not a legal voter, and that there were two more illegal votes cast, but for whom could not be determined.

The contestant contends that five other persons who voted for Edgington were also illegal voters, the principal objection to each being that he was not a resident and citizen of Idaho Falls as required by law. There was substantial evidence in each instance to the effect that such person was a citizen entitled to vote in Idaho Falls, and this court will not disturb the findings of the district court to that effect.

In addition to the instances mentioned, the contestant alleges that a large number of other persons were permitted to vote who were not registered as required by law, and urges that therefore the vote of the precinct wherein they voted should be rejected.

There is nothing in the evidence to show that such persons were not citizens qualified to register and vote. They applied to the election officers for leave to register and vote upon election day, signed the elector's oath as requested, and did everything the election officers required of them. There is evidence to the effect that such persons were vouched for by

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freeholders orally, answered questions giving the necessary information for filling in the blanks in the oaths, to establish that they were qualified to be registered to vote, and that such blanks were not filled in on election day because voters came too fast to afford time therefor, and that the election officers planned to fill in the blanks later.

The district court found that the acts of the officers in receiving the votes of those who attempted to register and vote on the day of election were done in good faith and without any intentional wrong upon their part or upon the part of the voters, and that such persons were legal voters and were rightfully permitted to vote, although there were some irregularities in the method of registering the voters and in the conduct of the election officers.

The irregularities complained of consisted in a failure upon the part of the election officers to furnish sufficient supplies so that the freeholders' oaths vouching for the qualifications of the voters registered on election day might be made out; that the voters in some instances did not bring freeholders to the polls to vouch for them; neglect of the officers registering voters at the polls on election day to fill out all blanks in the electors' oaths; and a failure of the registering officer to sign the jurat or formally administer the electors' oaths to the voters.

It is contended by the contestant that the burden rests upon the party claiming the benefit of the votes challenged by a contest to show that such persons were legal voters, after it is made to appear that there were irregularities in the method of registering such persons.

Any irregularities which tend to show such fraud on the part of voters or election officers that raises a doubt as to the result of the election may place the burden upon the party claiming the benefit of such votes to show that those who voted were in fact legal voters, but in the first instance the burden is upon the party contesting an election to make a *prima facie* showing to the effect that sufficient illegal votes were cast, or legal votes rejected, to change the result of the election, or that such serious wrong or fraud existed as to

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make the result of the election doubtful. (*Tarbox v. Sugh-rue*, 36 Kan. 225, 12 Pac. 935.)

While it is apparent that there were irregularities in the conduct of the election in Idaho Falls, they do not seem to make the result of the election doubtful, nor is this court convinced that there was intentional wrongdoing or fraud such as to vitiate the election. There is no contention that any legal votes were rejected, and the evidence does not prove that there were sufficient illegal votes received to change the result declared by the canvassing board.

The contestant urges that the irregularities as to registering voters, the failure of the election officers to furnish enough supplies and to properly certify the results of the election, the carelessness of the election officers in leaving the ballot-box in a passageway in the city hall and the uncertainty as to what was done with the keys, justify the throwing out of the votes of ward No. 1. While the vote of a precinct may be rejected in certain instances, it is a drastic measure used only in emergencies, and should not be resorted to whenever it is possible to purge the election of irregularities without depriving citizens of their vote. Such action has the effect of punishing and invalidating the votes of loyal citizens in order to prevent the fraud and wrongdoing of dishonest persons seeking to vote illegally, and while in some instances it is justified, in this case the irregularities complained of were not such as to warrant the court in rejecting the vote of the precinct referred to. It is apparent that the polls could have been purged of the illegal votes, and that the other irregularities complained of did not cast serious doubts upon the results of the election.

The contestant contends that the irregularities and disregard of the law upon the part of the election officers amounts to the same thing as actual fraud, in effect, and he insists that all the votes cast under such circumstances are illegal votes. He cites sec. 2 of art. 6 of the constitution and claims that since it is necessary for a voter to be "registered as provided by law," it invalidates the votes where there are irregularities in the registering of voters. This raises the

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question as to what is required as a substantial compliance with the registration laws to entitle citizens to vote. It has been held frequently that a strict, literal compliance with the provisions of the law as to registration will not be required in the absence of fraud or intentional wrongdoing. If a person is a citizen, has the other qualifications of a voter and does everything required of him to register and vote, the failure of the election officers to do their part in every detail will not deprive the citizen of the right to vote. Voters are not chargeable with constructive notice of the failure of registration officers to fill in the blanks in the forms for oaths after all questions are answered and the necessary information given so that such blanks may be filled in by the officers. It is inevitable that mistakes shall occur in elections because of the inexperience of election officers, and sometimes the law cannot be strictly complied with, but where the will of the citizen legally entitled to vote is apparently correctly expressed, such mistakes or oversights as do not result in making the election uncertain will not be allowed to defeat the choice of the electors. Many of the provisions of law are directed to the officers of election, and the citizens applying to vote will not be required to see that the election officers do their full and exact duty with respect to such matters. Statutes prescribing the manner, form and time within which public officers shall discharge public functions are regarded as directory, unless there is something in the statutes which shows a different intent. Hence, as a general rule, statutes prescribing the duties of election officers relative to registering voters should not be so construed as to make the right of citizens to vote depend upon a strict observation of the law by such officers. (*McGrane v. Nez Perce County*, 18 Ida. 714, Ann. Cas. 1912A, 165, 112 Pac. 312, 32 L. R. A., N. S., 730; *Vigil v. Garcia*, 36 Colo. 430, 87 Pac. 543; *Lehman v. Pettingell*, 39 Colo. 258, 89 Pac. 48; *Packwood v. Brownell*, 121 Cal. 478, 53 Pac. 1079; *People v. Earl*, 42 Colo. 238, 94 Pac. 294; *Lane v. Bailey*, 29 Mont. 548, 75 Pac. 191; *Quinn v. Lattimore*, 120 N. C. 426, 58 Am. St. 797, 26 S. E. 638; *People v. Wood*, 148 N. Y. 142, 42 N. E.

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536; *Stackpole v. Hallahan*, 16 Mont. 40, 40 Pac. 80, 28 L. R. A. 502; *Earl v. Lewis*, 28 Utah, 116, 77 Pac. 235.)

Even though the constitution and laws may require that citizens shall be registered as a prerequisite to the right to vote, there is a vast difference between irregular registration and no registration at all. An attempt to register which may not fully comply with the specific requirements of the statutes may nevertheless satisfy the constitutional provision, and thus entitle the citizen to vote. (*People v. Earl, supra*; *Stinson v. Sweeney*, 17 Nev. 309, 30 Pac. 997.)

Where irregularities deprive qualified electors of their constitutional right to express their judgment at the election, or permit persons not entitled to vote to participate in the election and directly affect the result of the election, the drastic remedy of rejecting the vote of the entire precinct may be adopted, but not otherwise.

McGrane v. Nez Perce County, supra, states: "The prohibition contained in sec. 408, Rev. Codes, against election officers furnishing the electors with ballots containing distinguishing marks, is directed against the officers charged with the preparation and furnishing of the ballots, and directs and commands the officers as to the manner and method of discharging their public duties, but the statute nowhere prescribes that the penalty for violating this duty, or a failure to faithfully discharge it, shall be visited upon the electors or avoid the election." Likewise it is the duty of election officers to furnish necessary blank forms at an election so that a freeholder may vouch in writing for a citizen registering at the polls on election day, and the registering officer should formally administer the oath to a citizen who signs an elector's oath, and should fill in all blanks according to the information given by the citizen, but a failure on the part of such officer to do the things required of him should not avoid the election, so long as the result is not thereby made doubtful.

"We can conceive of no principle which permits the disfranchisement of innocent voters for the mistake, or even the wilful misconduct, of election officers in performing the duty cast upon them." (*People v. Wood, supra*.)

Points Decided.

"It is a rule, well grounded in justice and reason, and well established by authority and precedent, that the voter shall not be deprived of his rights as an elector, either by the fraud or mistake of the election officer, if it is possible to prevent it." (McCrary on Elections, 3d ed., sec. 196.)

The act of the canvassing board in accepting the computation from the tally-sheet as to the number of votes cast for the candidates, instead of the certificate of the election officers, which was shown on the face of the returns to be incorrect was a justifiable exercise of authority under the circumstances. The record seems to have clearly shown a clerical error in computation, and it is the duty of such board to adopt the showing necessary to make the result of the canvass speak the truth, if it is apparent from the face of the returns, for the intention of the voters should govern, if clearly ascertainable, and the votes should be canvassed and counted for the persons entitled thereto.

The judgment appealed from is affirmed. Costs are awarded to respondent.

Morgan and Rice, JJ., concur.

(March 12, 1917.)

WILLIAM C. BOWERS, Appellant, v. RICHARD BENNETT, Sr., Respondent.

[164 Pac. 93.]

ESCROW AGREEMENT—MISTAKE—REFORMATION OF CONTRACT—CONDITIONS PRECEDENT—WAIVER OF STRICT PERFORMANCE OF CONTRACT—EVIDENCE.

1. Parol evidence is admissible for the purpose of showing that, by reason of mistake, a written instrument does not truly express the intention of the parties. A mistake of the scrivener whereby he fails to express the agreement of the parties may be corrected.

2. Where the suit to reform the contract is incidental to another action, no prior demand for reformation need be made. This is

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especially true where it clearly appears that such a demand would be refused.

3. *Held*, that in this action it was not necessary for respondent to return to appellant the initial payment made upon the purchase price of the land or the interest on deferred payments as a condition precedent to the bringing of the suit for the reformation of the contract.

4. Where time is agreed to be of the essence of a contract for the sale of real estate, the fact that the vendor accepts an interest payment a short time after it is due does not operate as a waiver of promptness in future payments.

5. In this state the law requiring a party to establish his case "beyond a reasonable doubt" applies only in criminal cases and not in a suit for the reformation of a contract, and the case of *Houser v. Austin*, 2 Ida. 204, 10 Pac. 37, so far as it is in conflict herewith, is overruled, and the case of *Panhandle Lumber Co. v. Rancour*, 24 Ida. 603, 135 Pac. 558, approved and followed.

[As to causes and proceedings for reformation of instruments, see note in 65 Am. St. 481.]

APPEAL from the District Court of the Fourth Judicial District, for Elmore County. Hon. Chas. O. Stockslager, Judge.

Action for damages and cross-complaint for reformation of contract. Judgment for defendant. *Affirmed*.

Richards & Haga and McKeen F. Morrow, for Respondent.

Where there is any substantial evidence to support the findings of the trial court, they will not be disturbed on appeal. (*Smith v. Faris-Kesl Const. Co.*, 27 Ida. 407, 150 Pac. 25; *Bower v. Moorman*, 27 Ida. 162, 147 Pac. 496; *Pomeroy v. Gordan*, 25 Ida. 279, 137 Pac. 888, and cases cited; *Brown v. Grubb*, 23 Ida. 537, 130 Pac. 1073.)

A party seeking reformation of a contract is not required to establish his case beyond a reasonable doubt, and the findings will not be disturbed on appeal, even though the evidence is conflicting. (*Panhandle Lumber Co. v. Rancour*, 24 Ida. 603, 135 Pac. 558; *Sullivan v. Moorhead*, 99 Cal. 157, 33 Pac. 796; *Hutchinson v. Ainsworth*, 73 Cal. 452, 2 Am. St. 823,

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15 Pac. 82; *Wilson v. Moriarty*, 88 Cal. 207, 211, 26 Pac. 85; *Home & Farm Co. v. Freitas*, 153 Cal. 680, 96 Pac. 308.)

Parol evidence is admissible to supply terms omitted from writing by mistake, and findings based thereon will be sustained even though the evidence is conflicting. (*Jarrett v. Prosser*, 23 Ida. 382, 130 Pac. 376; 2 Pomeroy Eq. Jur., secs. 858, 859; *Walden v. Skinner*, 101 U. S. 577, 25 L. ed. 963; *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559.)

The conditions on which a deed or other instrument is deposited in escrow may rest in parol or be partly in parol and partly in writing, and the rule that a written contract must be taken to contain the entire agreement of the parties has no application in such cases. (11 Am. & Eng. Ency. Law, 334; *Gaston v. City of Portland*, 16 Or. 255, 19 Pac. 127; *Stanton v. Müller*, 58 N. Y. 192; *Fred v. Fred* (N. J.), 50 Atl. 776; *Minnesota & Oregon Land & T. Co. v. Hewitt Inv. Co.*, 201 Fed. 752, *Nichols v. Oppermann*, 6 Wash. 618, 34 Pac. 162; *Cannon v. Handley*, 72 Cal. 133, 13 Pac. 315; *Bronx Inv. Co. v. National Bank of Commerce*, 47 Wash. 566, 92 Pac. 380.)

Where a written instrument is drawn and executed which is intended to carry into execution a parol agreement, but by mistake of the draftsman, either as to fact or law, it does not fulfil or violates such oral agreement, equity will correct the writing so that it will conform to the agreement, unless the mistake was wilful or fraudulent on the part of the party seeking reformation. (*Christensen v. Hollingsworth*, 6 Ida. 87, 96 Am. St. 256, 53 Pac. 211; *Panhandle Lumber Co. v. Rancourt*, 24 Ida. 603, 135 Pac. 558; *Jarrett v. Prosser*, 23 Ida. 382, 130 Pac. 376; *Wollan v. McKay*, 24 Ida. 691, 15 Pac. 832; *Lestrade v. Barth*, 19 Cal. 660; *Hathaway v. Brady*, 23 Cal. 121; 24 Am. & Eng. Ency. Law, 646, 20 Am. & Eng. Ency. Law, 823; *Snell v. Insurance Co.*, 98 U. S. 85, 95, 25 L. ed. 52, 56; *Dennis v. Northern Pac. Ry. Co.*, 20 Wash. 320, 55 Pac. 210; *Adams v. Reed*, 11 Utah, 480, 40 Pac. 720; *Chamberlain v. Thompson*, 10 Conn. 243, 26 Am. Dec. 390; *Newcomer v. Kline*, 11 Gill & J. (Md.) 457, 37 Am. Dec. 74.)

Where reformation of a written contract is sought by way of defense in an action thereon or as incidental to other relief

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prayed for or other defenses made, no demand on the other party to reform the contract is necessary. (34 Cyc. 944; *Nichols & Shepard Co. v. Berning*, 37 Ind. App. 109, 76 N. E. 776; *Parchen v. Chessman*, 49 Mont. 326, Ann. Cas. 1916A, 681, 142 Pac. 631, 146 Pac. 469; *Jones v. McNealy*, 139 Ala. 378, 101 Am. St. 38, 35 So. 1022; *Johnson v. Sherwood*, 34 Ind. App. 490, 73 N. E. 180; *First Nat. Bank v. Bacon*, 113 App. Div. 612, 98 N. Y. Supp. 717; *Citizens' Nat. Bank v. Jury*, 146 Ind. 322, 43 N. E. 259.)

The general rule seems to be that of the California courts, that demand is never necessary before seeking reformation. (*Danielson v. Neal*, 164 Cal. 748, 130 Pac. 716; *Home & Farm Co. v. Freitas*, 153 Cal. 680, 96 Pac. 308; *Braithwaite v. Henneberry*, 124 Ill. App. 407, 222 Ill. 50, 78 N. E. 34.)

Restoration of the *status quo* is not a condition precedent to reformation. (*Keeley v. Sayles*, 217 Ill. 589, 75 N. E. 567.)

Respondent did not waive the provision of the agreement entitling him to a surrender of the deed on failure to pay the instalment due October 1, 1908. (*Prairie Dev. Co. v. Leiberger*, 15 Ida. 379, 98 Pac. 616.)

Claude W. Gibson, for Appellant.

To sustain the judgment reforming the written escrow agreement, the evidence must be such as to leave no reasonable doubt in the mind of a reasonable court as to what the mistake consists of, what correction should be made, that the mistake was mutual and common to both parties, and that both have done what neither intended, and that the mistake was of both parties. (*Houser v. Austin*, 2 Ida. 204, 10 Pac. 37; *Jarrett v. Prosser*, 23 Ida. 382, 130 Pac. 376; note b to 117 Am. St. 230; *Miller Bros. v. McCall Co.*, 37 Okl. 634, 133 Pac. 183; 34 Cyc. 915.)

Demand for reformation before suit is indispensable. None was made. (34 Cyc. 944; *Axel v. Chase*, 77 Ind. 74; *Black v. Stone*, 33 Ala. 327; *Brainerd v. Arnold*, 27 Conn. 617; *Kessler v. Pruitt*, 14 Ida. 175, 93 Pac. 965.)

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Defendant did not put plaintiff *in statu quo*, which was imperative before or when suit for reformation was begun. (*Cassidy v. Metcalf*, 66 Mo. 519, 535; *Keeley v. Sayles*, 217 Ill. 589, 75 N. E. 567; *Youngstown Electric Light Co. v. Butler County Poor Dist.*, 21 Pa. Super. Ct. 95.)

If time was of the essence of the contract, by his actions defendant waived the same. (*Douville v. Pacific Coast Casualty Co.*, 25 Ida. 396, Ann. Cas. 1917A, 112, 138 Pac. 506; *Watson v. White*, 152 Ill. 364, 38 N. E. 902; *Prairie Dev. Co. v. Leiberg*, 15 Ida. 379, 98 Pac. 616.)

MORGAN, J.—This action was commenced by appellant to recover damages for breach of an escrow agreement. He alleges in his complaint, among other things, that on April 5, 1907, respondent executed a deed conveying to him certain land; that he paid part of the purchase price and executed two promissory notes for the balance, one note showing on its face that it was due Oct. 1, 1908, and the other Oct. 1, 1909, and each providing that interest be paid annually; that immediately after the execution of the notes, and on the same day, the parties entered into a written agreement by the terms of which the deed and notes were placed in escrow in a certain bank, the deed to be delivered to appellant upon the condition that the interest upon the notes be paid at the time provided therein, and that the principal be paid on or before Oct. 1, 1909, and if the principal or interest be not so paid, the respondent, at his option, might declare a forfeiture and retain, as liquidated damages, any and all sums paid under the terms of the contract; that on April 24, 1908, he paid the annual interest on the notes, which was due April 5th, and that respondent accepted the same; that on Oct. 1, 1908, he tendered the interest due on the notes and respondent refused to accept it unless the principal of the note purporting on its face to be due Oct. 1, 1908, be paid; that he made another tender Oct. 31st of interest, which was refused for the same reason; that on Nov. 2, 1908, respondent declared the contract forfeited, took the deed from escrow and destroyed it, marked the notes void, gave notice that he considered the contract terminated,

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and demanded that appellant vacate the premises; that on March 2, 1909, and July 1, 1909, appellant tendered the whole amount due, principal and interest, but respondent refused to accept the same or convey the premises.

Respondent filed an answer and cross-complaint admitting the execution of the deed, notes and agreement and the placing of the same in escrow, but alleged that prior to the execution of the escrow agreement, he and appellant entered into an oral contract, by the terms of which the notes were to be paid when they became due as shown upon their face, namely, Oct. 1, 1908, and Oct. 1, 1909, and that it was the intention of both parties that the escrow agreement should so provide, but that the scrivener who wrote the agreement, inadvertently and through mistake, failed to incorporate the provisions that the notes should be paid when they matured as shown upon their face, but provided instead that both of them be paid on or before Oct. 1, 1909, and that the parties, through a mutual mistake as to the terms of the written agreement in this respect, signed the same. Respondent denied that appellant had ever made any tender to him of the interest or principal and prayed judgment that the agreement be reformed to conform to the true intent of the parties, that appellant be declared to have been in default since Oct. 1, 1908, and that all sums paid by him be retained as damages.

Appellant answered denying the material allegations of the cross-complaint. By stipulation the case was tried before the judge without a jury. Findings of fact and conclusions of law were made and judgment was thereupon entered in favor of defendant, from which this appeal is prosecuted.

Appellant contends that the court erred in finding that the real agreement was oral and that, through the mistake of the scrivener, the written agreement was made to provide for both notes to be due on or before Oct. 1, 1909, instead of one being due Oct. 1, 1908, and the other Oct. 1, 1909, and that this escrow agreement was signed by both parties under the mutual mistake that it embodied the terms of the oral contract. Appellant testified that there was no oral understanding that one note be paid Oct. 1, 1908, but that both parties,

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at the time they signed the written agreement and put it in escrow, understood that both notes were due Oct. 1, 1909. On the other hand, respondent and his son testified, and to some extent they were corroborated by the witness, Watkins, a real estate broker, that there was an oral agreement with appellant that one note be paid Oct. 1, 1908, and that the escrow agreement was to be drawn to that effect, and respondent testified that he had always understood that one note was due a year before the other, and that he had thought the written escrow agreement so provided. Respondent and his son testified that a few days prior to Oct. 1, 1908, appellant met respondent and inquired what he would do if the note was not paid; that he did not consent to an extension of time and that on this occasion no tender was made. This evidence tends to show that appellant himself believed the written agreement provided that one note was due Oct. 1, 1908. Moreover, according to the terms of the written agreement, no interest was due in October, 1908, and appellant's tender during that month has a tendency to show that he understood the agreement to be that one of the notes was due. This is a circumstance which tends to corroborate respondent's testimony.

It is a well-established rule of law that parol evidence is admissible for the purpose of showing that, by reason of a mistake, a written instrument does not truly express the intention of the parties. (17 Cyc. 702, and cases cited in notes 84 and 85.)

"A mistake of the scrivener whereby he fails to carry out the agreement of the parties may be corrected." (34 Cyc. 915, and cases cited in note 82; *Panhandle Lumber Co. v. Rancour*, 24 Ida. 603, 135 Pac. 558.)

Appellant contends that the evidence was insufficient to warrant the findings of the court that there was an oral understanding and a mistake in reducing the same to writing, and cites some authorities, among which is that of *Houser v. Austin*, 2 Ida. 204, 10 Pac. 37, to the effect that before relief can be obtained in the reformation of a written contract, signed through mistake, the evidence must be such as to leave no reasonable doubt in the mind of the court as to what the

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mistake was, the real intention, and that the mistake was mutual.

Houser v. Austin, supra, is, in effect, overruled in case of *Panhandle Lumber Co. v. Rancour, supra*, wherein the court in construing sec. 4824, Rev. Codes, in substance said that where witnesses have appeared before the trial court and testified, the findings and judgment, upon conflicting evidence, will not be disturbed if there is substantial proof to support them.

The testimony in this case, as to the oral agreement between the parties and as to a mistake having been made in reducing it to writing, is conflicting, but when the rule announced in *Panhandle Lumber Co. v. Rancour, supra*, which is the settled law of this state upon the subject, is applied to the evidence submitted upon that point, we find the proof to be sufficient to sustain the findings of the trial court to the effect that the parties did orally agree that the purchase price should be paid according to the terms of the promissory notes placed in escrow, and that, through mistake of the scrivener, the written contract of escrow did not contain the true agreement. No doubt the trial court had in mind and was governed by the rule that evidence of mutual mistake must be clear, convincing and satisfactory.

The trial court found as a fact that appellant made no tender on March 2, 1909, or at any other time, to pay either principal or interest, except the interest payment in April, 1908, and a deposit in the bank on account of interest made Oct. 31st of the same year, which latter was returned to him by direction of respondent. This finding is assigned as error. There was some testimony tending to show that purchasers were found who were ready, willing and able to buy the property and to pay the amount due to respondent, but neither offer amounted to a tender. That such offers were actually made was disputed and, at most, it constituted a conflict in the testimony, and the evidence upon this point is ample to sustain the findings.

In his brief appellant insists that because, on April 24, 1908, respondent accepted interest due April 5th, he waived

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time as being of the essence of the contract. We hold, however, that he waived it in regard only to this payment, but not as to future payments. The authorities cited by appellant in this respect are to the effect that where time is agreed to be of the essence of a contract, but that both parties have, by their course of action, waived a prompt performance, or where one party has permitted the other, for a long time, to become slack in his performance, he cannot suddenly change his course of action after thus lulling the other into a sense of security and declare a forfeiture without notice first that if the other does not promptly perform, the forfeiture will be declared.

In this case appellant, though he did not make the interest payment on the very day it was due, made it in a reasonable time, and respondent had not so acted as to give him the impression that he did not consider time to be of the essence of the contract. (39 Cyc. 1395, and cases cited in note 82; *Prairie Dev. Co. v. Leiberg*, 15 Ida. 379, 98 Pac. 616.)

It is contended by appellant that no demand for reformation was made before suit, and that such demand is necessary. That contention cannot be sustained in this case. Where the suit to reform is incidental to another action, no prior demand need be made. (34 Cyc. 944; *Johnson v. Sherwood*, 34 Ind. App. 490, 73 N. E. 180; *Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259; *Earl v. Van Natta*, 29 Ind. App. 532, 64 N. E. 901; *Danielson v. Neal*, 164 Cal. 748, 130 Pac. 716.)

Where a party's conduct plainly shows that a demand would be refused, none need be made, for the reason that the law will not require an idle act to be done. (*Sutherland v. Green*, 49 Mont. 379, Ann. Cas. 1916A, 561, 142 Pac. 636.)

It is insisted that, as a condition precedent to the reformation of the contract, appellant must be placed *in statu quo* by the return to him of the initial payment he made upon the land, together with interest collected from him upon deferred payments, and appellant cites a number of cases in support of this contention, which, however, are not in point, but apply to cases where the plaintiff has received from the other party

Points Decided.

some benefit to which he would not be entitled under the instrument as reformed. (*Keeley v. Sayles*, 217 Ill. 589, 75 N. E. 567.)

Appellant relies upon a number of assignments of error which are not discussed herein, for the reason we deem them to be immaterial in view of the conclusion reached that the action of the trial court in reforming the written contract of escrow should be sustained, and that its finding that appellant committed a breach of the contract, as reformed, is fully supported by the evidence.

The judgment appealed from is affirmed. Costs are awarded to respondent.

Budge, C. J., and Rice, J., concur.

Petition for rehearing denied.

(March 17, 1917.)

M. E. LEWIS, Appellant, v. A. O. CHRISTOPHER, as Assessor and Tax Collector of Canyon County, Idaho, and the COUNTY OF CANYON, a Body Corporate, Respondents.

[163 Pac. 916.]

STATE LANDS—PURCHASER OF—TAXABLE INTEREST.

Held, where one purchases state land under an instalment contract, his interest, which is subject to taxation, under secs. 1586 and 1643, Rev. Codes, bears the same relation to the full cash value of the land as the amount actually paid upon his contract bears to the total purchase price.

[As to validity of statute providing for assessment of property at a fixed per cent of value, see note in *Ann. Cas.* 1915D, 446.]

APPEAL from the District Court of the Seventh Judicial District, for the County of Canyon. Hon. Ed. L. Bryan, Judge.

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Action brought to cancel and set aside assessment and tax levied in pursuance thereof. From a judgment of dismissal, plaintiff appeals. *Affirmed*.

Geo. H. Van de Steeg, for Appellant.

Under the contract alleged, title was still vested in the state at the time of this assessment. The land itself, therefore, could not be taxed—it was exempt. If it is taxed, it cannot be sold; if it is sold, the sale is a mere nullity, and no title can be acquired by virtue of the sale. The sale gives rise to no lien upon the land; it is absolutely void and of no effect. (*Quivey v. Lawrence*, 1 Ida. 313; *State v. Stevenson*, 6 Ida. 367, 55 Pac. 886.)

The statute, after specifically exempting state lands, permits the taxation of the value of the purchaser's interest, which cannot be a tax upon the land itself, and if it is not a tax upon the land, then it is not a tax upon real property, and if it is not a tax upon real property, then it cannot be anything but a tax upon personal property.

The purchaser of state lands under these contracts does not hold the equitable title, for the equitable title does not pass under forfeiture contracts. (*Commissioners of Douglas County v. Union Pac. Ry. Co.*, 5 Kan. 615.)

The statute should be interpreted strictly against the taxing power and not in favor of such power. (*East Livermore v. Livermore Falls Trust & B. Co.*, 103 Me. 418, 13 Ann. Cas. 631, 69 Atl. 306, 15 L. R. A., N. S., 952.)

Alfred F. Stone and H. A. Griffiths, for Respondents.

Revenue statutes are to be construed so as to effect the object of such statutes and promote justice. Statutes of exemption are to be strictly construed against exemptions and in favor of revenue. (*Salisbury v. Lane*, 7 Ida. 370, 63 Pac. 383.)

BUDGE, C. J.—This is an action brought by the appellant against respondent, Christopher, as assessor and tax collector

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of Canyon county, and the county of Canyon, for the purpose of canceling and setting aside an assessment and a tax levied in pursuance thereof, upon appellant's interest in certain land, purchased from the state under its regular contract of sale, providing for deferred payments. To appellant's complaint a demurrer was filed by respondents and by the court sustained, whereupon appellant refused to plead further and judgment of dismissal was duly entered. This appeal is from the judgment.

It appears that the assessor of Canyon county, in 1912, found said land to be of the full cash value of two thousand dollars, and the assessed value to be eight hundred dollars or forty per cent thereof. In order to determine the value of appellant's taxable interest in the land, the assessor divided three hundred and twenty dollars, the amount paid upon the principal of the purchase price by the appellant, by eight hundred dollars, the full purchase price of the land, and obtained as a quotient the fraction four-tenths, which represented the portion of the total assessed valuation of the land upon which appellant's taxes were based. In other words, the total assessed valuation of the land, as found by the assessor, for taxation purposes, was two thousand dollars; appellant having paid four-tenths of the purchase price of the land, the value of his interest therein, which was subject to taxation was four-tenths of the actual full cash value of the land at the time the assessment was made.

The appellant contends that the foregoing method employed by the assessor was contrary to law, and insists that the full cash value of his interest subject to taxation had no relation to the actual full cash value of the land itself, but was the amount of money paid by the appellant to the state under the terms of his contract, and no more. The theory of the appellant is that the assessor should have ignored the actual cash value of the land, as being wholly immaterial, and should have fixed the cash value of appellant's interest therein at three hundred and twenty dollars, the amount actually paid to the state under his contract, which for the purposes of taxation

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should be considered as the assessable interest of appellant; and should have taken forty per cent thereof and computed the taxes thereon.

The only material question in this case is whether the assessor's method of obtaining the assessed valuation of appellant's interest in this land is the correct one, and involves the construction of secs. 1586 and 1643, Rev. Codes, and sec. 1652, Rev. Codes, as amended by Special Sess. Laws 1912, p. 26.

It is insisted by appellant that this is a tax upon personal property or a tax upon money and not a tax upon the interest or equity of appellant in the land. With this contention we are not in accord. In our opinion, for the purposes of taxation, the interest that appellant has in the land purchased from the state is subject to assessment as real estate under the provisions of subd. B, sec. 1646, Rev. Codes, as amended by Special Sess. Laws 1912, p. 24, which is as follows:

“The term ‘real estate’ includes: (1) The possession of, claim to, ownership of, or right to the possession of land or separate estates, easements or interests therein.”

The appellant in the instant case has the possession of the land purchased under his contract from the state and has the right to the possession of the same so long as he complies with the terms of his contract, upon the fulfilment of which he will be entitled to an absolute conveyance of title from the state. And it is clear that his interest in the land, under the above terms of the statute is “real estate” and not “personal property.” That being true, it was the duty of the assessor to determine the “full cash value” of the land and then to ascertain appellant's interest therein.

While it is true, under the provisions of secs. 1586 and 1643, *supra*, that the land itself is not subject to taxation while the title to the same remains vested in the state, it is likewise true that the value of the interest therein of the purchaser or certificate holder may be taxed, and this interest is not limited to the amount of money paid under the terms of the contract, but to the value of appellant's interest in the land. The value of this interest can only be properly determined by ascertaining the full cash value of the land upon the market

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in the ordinary course of trade and then determining the value of appellant's interest in the land.

The land cannot be sold for taxes so long as the title remains in the state, but the interest of the certificate holder in the land is such an equitable interest as may be sold for delinquent taxes. And the purchaser thereunder would be entitled to continue payments to the state with the right to mature the contract and to the possession of the premises. In other words, a purchaser under such circumstances would stand in the same relation to the state that the original purchaser occupied, and upon compliance with the terms of the contract become the owner in fee of the land.

We think that a fair and reasonable construction of secs. 1586 and 1643, *supra*, keeping in view that, in construing revenue statutes, we should consider primarily the purpose rather than the letter of the law; and that all statutes pertaining to revenue are to be construed most strictly in favor of the object of the statute; that is, in favor of the purpose of the statute rather than to defeat the object or purpose of the statute, to the end that all property bear its equitable share of the entire burden of the taxes, is that the interest subject to taxation, of a purchaser of state land, bears the same relation to the full cash value of the land as the amount actually paid upon his contract bears to the total purchase price; and since the assessor followed this method, the judgment of the trial court, in sustaining the demurrer, must be affirmed, and it is so ordered. Costs awarded to respondents.

Morgan and Rice, JJ., concur.

Argument for Appellants.

(March 19, 1917.)

J. M. BRUNZELL, Respondent, v. J. R. STEVENSON and J. S. STEVENSON, Copartners Doing Business Under the Firm Name and Style of STEVENSON BROS., and H. W. STEVENSON, Appellants.

[164 Pac. 89.]

INJUNCTION—JUDGMENT—COSTS.

1. An injunction will not issue unless it appears that the party against whom the relief is sought is violating, or will or threatens to violate, some right of the party seeking the remedy.

2. Judgment must be limited to the relief demanded, or to such as is embraced within the issues.

3. Actions involving title to or possession of irrigating ditches are within the meaning of secs. 4901 and 4903, Rev. Codes, and the party in whose favor judgment is rendered is entitled to recover costs of suit.

[As to what is within the meaning of the law of irreparable injury, see note in 1 Am. St. 374.]

APPEAL from the District Court of the Third Judicial District, for Owyhee County. Hon. Carl A. Davis, Judge.

Suit to quiet title to an irrigation ditch and to enjoin defendants from interfering with the rights of plaintiff to the same. From a judgment for plaintiff, defendants appeal. *Reversed.*

Smead, Elliott & Healy, for Appellants.

Some sound and substantial reasons must affirmatively appear before a court will be justified in invoking so drastic a power as injunction. (*Healy v. Smith*, 14 Wyo. 253, 116 Am. St. 1004, 83 Pac. 583; *High on Injunctions*, 4th ed., par. 22; *Van Horn v. Decrow*, 136 Cal. 117, 68 Pac. 473, 16 Am. & Eng. Ency. Law, 561; *Boise Dev. Co. v. Idaho Trust & Savings Bank*, 24 Ida. 36, 133 Pac. 916.)

Under sec. 4353, Rev. Codes, the extent of the relief granted is governed by the issues. This section is the same as sec. 580

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of the California Code of Civil Procedure. Concerning this, that court, in the case of *Yuba County v. Kate Hayes Min. Co.*, 141 Cal. 360, 74 Pac. 1049 says: "The court cannot grant any relief except such as is embraced within the issues and consistent with the case made."

In an action involving the title or possession of real estate, the costs must be awarded to the prevailing parties. The court has no discretion in awarding costs in actions of this character, and it makes no difference whether the action is legal or equitable. (*Stoddard v. Treadwell*, 29 Cal. 281; *Lawrence v. Getchell*, 2 Cal. Unrep. 267, 2 Pac. 746; *Schmidt v. Klotz*, 130 Cal. 223, 62 Pac. 476; *Sierra Union Water & Min. Co. v. Wolff*, 144 Cal. 430, 77 Pac. 1038; *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. 569; *Petitpierre v. Maguire*, 155 Cal. 242, 100 Pac. 690.)

Under sec. 3656, Rev. Codes, an irrigation ditch is real estate. (*Ada County Farmers' Irr. Co. v. Farmers' Canal Co.*, 5 Ida. 793, 51 Pac. 990, 40 L. R. A. 485; 11 Cyc. 49, 53.)

Perky & Brinck, for Respondent.

The court, while awarding plaintiff a part of the relief asked, apportioned the costs by ordering each party to pay his own costs; and had plaintiff appealed from this part of the judgment, he must have obtained a reversal as to costs, the whole costs being properly chargeable to defendants. Certainly, however, the defendants cannot complain; the error, if any existed, was in their favor. This proposition is borne out by the cases cited by counsel in their brief; unless the case of *Lawrence v. Getchell*, 2 Cal. Unrep. 267, 2 Pac. 746, be an exception.

The decree cannot be disturbed as to the costs of the trial. (*Hoyt v. Hart*, 149 Cal. 722, 87 Pac. 569.)

MORGAN, J.—It is alleged in the complaint that respondent is the owner and entitled to the exclusive possession of an irrigation ditch running through lands belonging to him, situated in Owyhee county; that he built the ditch and for more than twenty-five years has used it as a necessary means

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of irrigating his land; that for more than five years preceding the time of the acts of appellants complained of his use of it was open and notorious and in hostility to any right or title claimed by them; that on May 16, 1912, appellants took possession of it for their exclusive use, dammed and blocked it, prevented him from using it and threaten to continue to do so; that they claim some interest therein, but that their claim is without right or foundation. He asks that appellants be required to set up the nature of their claim, that he be adjudged to be the sole owner and entitled to the exclusive possession of the ditch, and that they be enjoined from interfering with his use of it.

Appellants filed an answer, consisting of general denials and affirmative matter, and alleged that they are owners of lands adjacent to those of respondent; that in 1883 their predecessor in interest, one McDonald, owned and was in possession of these lands and, together with respondent, constructed the ditch for their joint use, and that each party paid half of the cost of building and maintaining it; that since that time McDonald and his successors in interest have paid half the cost of maintenance, and have used the ditch jointly and as tenants in common with respondent until 1911, when he denied its use to appellants. Appellants denied the acts of trespass and the threats alleged in the complaint to have been made, and prayed that they be adjudged to be the owners of an undivided one-half interest in the ditch, and that respondent be enjoined from interfering with their use thereof.

The court, in its findings of fact, sustained appellants' contentions, but in its conclusions of law held that respondent was entitled to an order enjoining them from interfering with his possession and use of the ditch. Judgment was rendered adjudging that the parties were jointly entitled to possession and use of the ditch and, for that purpose, appellants were entitled to go upon respondent's land in a peaceful manner; that the parties contribute equally toward the maintenance of the ditch; that appellants be enjoined from forcibly taking possession of that part of it running through respondent's land, and from ejecting him therefrom or depriving him of

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the use thereof; that it is the duty of the parties to secure a water-master. No costs were awarded.

Appellants assign three errors. Assignment numbered 1 is: "The court erred in concluding as a matter of law that plaintiff is entitled to an injunction against the defendants restraining them from interfering with the possession and use of said ditch by the plaintiff, and that the court erred in enjoining and restraining the defendants."

The court found as a fact that appellants committed none of the acts of trespass complained of and that they did not threaten to commit them. An injunction is not to be granted unless the party seeking it shows that his rights are being violated, or that the party against whom the injunction is sought threatens to violate them. (*Boise Dev. Co. v. Idaho Trust & Savings Bank*, 24 Ida. 36, 133 Pac. 916; *Bower v. Moorman*, 27 Ida. 162, 147 Pac. 496, 22 Cyc. 758, 14 R. C. L. 354; *Healy v. Smith*, 14 Wyo. 263; 116 Am. St. 1004, 83 Pac. 583; *Van Horn v. Decrow*, 136 Cal. 117, 68 Pac. 473; High on Injunctions, 4th ed., par. 22.) We hold, therefore, that the action of the court complained of was error.

Assignment numbered 2 pertains to the appointment of a water-master. In the Sess. Laws, 1909, p. 104, there is a provision conferring upon the district judge power to appoint a water-master upon petition by one or more owners of irrigating ditches, where such owners cannot themselves agree in their choice. In this action, however, neither party petitioned for such appointment. The court cannot grant relief not embraced within the issues (sec. 4353, Rev. Codes; *Yuba County v. Kate Hayes Min. Co.*, 141 Cal. 360, 74 Pac. 1049), and therefore its action in directing the appointment of a water-master was erroneous.

Assignment numbered 3 brings up for review the refusal of the court to award costs of suit. Appellants claim they are entitled to costs; respondent contends that he was in part successful in his suit, that he was adjudged to have certain rights, which were denied by appellants, and that the action of the court in the matter of costs was therefore proper. A careful perusal of the answer shows that appellants acknowl-

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edged the ownership in respondent of an undivided one-half interest in the ditch. Every issue of fact raised by the complaint and answer was decided in their favor. It is true that respondent obtained injunctive relief, but this, we have decided, was erroneously given by the court. It is likewise true that appellants did not obtain the injunctive relief asked, but the court, as a conclusion of law, found they were entitled to it and the findings of fact fully sustain this conclusion.

This action involves title to, the right of possession of, and a right of way for an irrigation ditch. Under sec. 3056, Rev. Codes, ditches are classed as real estate. (*Ada County Farmers' Irr. Co. v. Farmers' Canal Co.*, 5 Ida. 793, 51 Pac. 990, 40 L. R. A. 485; *Nelson Bennett Co. v. Twin Falls Land etc. Co.*, 14 Ida. 5, at page 15, 93 Pac. 789; *Smith v. Faris-Kesl Const. Co.*, 27 Ida. 407, at page 431, 150 Pac. 25; *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. 569.) Sec. 4901, Rev. Codes, provides: "Costs are allowed, of course, to the plaintiff, upon a judgment in his favor, in the following cases: . . . 5. In an action which involves the title or possession of real estate. . . ." Sec. 4903, Rev. Codes, provides: "Costs must be allowed, of course, to the defendant upon a judgment in his favor in the actions mentioned in sec. 4901, and in special proceedings." We hold, therefore, that costs should have been awarded to appellants and that the court erred in failing so to do. (*Hoyt v. Hart*, *supra*; *Schmidt v. Klotz*, 130 Cal. 223, 62 Pac. 470.)

The judgment is reversed, with direction to the trial court to enter judgment for defendants in accordance with the views herein expressed. Costs on appeal are awarded to appellants.

Budge, C. J., and Rice, J., concur.

Argument for Appellant.

(March 19, 1917.)

JOHN E. REES, Respondent, v. O. W. GORHAM, Appellant.

[164 Pac. 88.]

TEST OF LEGAL OR EQUITABLE JURISDICTION—CANCELATION OF MORTGAGE—JURY TRIAL—SPECIAL INTERROGATORIES TO JURY—SPECIAL FINDINGS OF JURY NOT BINDING ON COURT.

1. *Held*, that the evidence in this case shown by the record is sufficient to support the findings and judgment of the lower court.

2. In determining the question of whether or not parties are entitled to a trial by jury, courts must look to the ultimate and entire relief sought, and where, in order for the court to render a judgment which would give adequate relief it would be necessary to decree the cancelation of a mortgage and the surrender of a note, such relief could only be available by the exercise of the equitable jurisdiction of the court, and the parties would not be entitled to a jury trial.

3. Where specific interrogatories are submitted to a jury in either a legal or equitable action, the findings of the jury in response thereto are not binding upon the court, which may disregard such findings if they are clearly against the evidence, and find the facts as shown by the evidence before it.

[As to right to jury trial in action at law in which equitable defense is interposed, see note in *Ann. Cas.* 1913D, 168.]

APPEAL from the District Court of the Sixth Judicial District, for the County of Lemhi. Hon. J. M. Stevens, Judge.

Action brought for the purpose of canceling a mortgage, and to require defendant to surrender to plaintiff a note, and for the recovery of damages. Judgment for plaintiff. Motion for new trial denied. *Affirmed*.

O'Brien & Glennon, for Appellant.

Equity will not entertain jurisdiction where there is an adequate remedy at law. (16 Cyc. 31 and cases cited; *County of Ada v. Bullen Bridge Co.*, 5 Ida. 188, 95 Am. St. 180, 47 Pac. 818; 2 Pomeroy's Eq. Jur., sec. 914; *Allerton v. Belden*, 49 N. Y. 373, 379.)

Argument for Respondent.

A court of equity will not interfere to decree the cancellation of a written instrument unless some special circumstance exists, establishing the necessity of a resort to equity to prevent an injury which might be irreparable, and which equity alone is competent to avert. (*Venice v. Woodruff*, 62 N. Y. 462, 20 Am. Rep. 495.)

E. W. Whitcomb, for Respondent.

The respondent has the right to have the note declared void and to have the mortgage canceled, which can only be done by the court taking equitable jurisdiction of the subject matter. (*Merritt v. Ehrman*, 116 Ala. 278, 22 So. 514; *Buxton v. Broadway*, 45 Conn. 540; *Benson v. Keller*, 37 Or. 120, 60 Pac. 918; *Ferguson v. Fisk*, 28 Conn. 501; *Fitzmaurice v. Mosier*, 116 Ind. 363, 9 Am. St. 854, 16 N. E. 175, 19 N. E. 180; *Otis v. Gregory*, 111 Ind. 504, 13 N. E. 39.)

The trial judge could set aside findings of the jury without granting a new trial. (Pomeroy's Eq. Jur., 3d ed., sec. 181, 231.)

The trial court having acquired equitable jurisdiction in the case, any findings of the jury would be purely advisory only. (*Brady v. Yost*, 6 Ida. 273, 55 Pac. 542; *Freeman v. Stephenson*, 63 Cal. 499; *Harris v. Lloyd*, 11 Mont. 390, 28 Am. St. 475, 28 Pac. 736; *Weiss v. Ahrens*, 24 Colo. App. 531, 135 Pac. 987; *Peters v. Leflang*, 6 Ida. 364, 55 Pac. 857; 10 R. C. L. 533, 534, sec. 317.)

In actions of this kind a party failing to object by demurrer or answer to the particular jurisdictions of the court, who joins in the issues and after the trial submits his case to the court, waives any objection which he otherwise might have to the right of the court to equitable jurisdiction. (*Reynes v. Dumont*, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. ed. 934; *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. ed. 1005; *Allen v. Pullman's Palace Car Co.*, 139 U. S. 658, 11 Sup. Ct. 682, 35 L. ed. 303; *Massachusetts General Hospital v. State Mut. Life Assur. Co.*, 4 Gray (70 Mass.), 227, 232; *Russell v. Loring*, 3 Allen (85 Mass.), 121, 126; *Coast Co. v. Spring Lake*, 58 N. J. Eq. 586, 47 Atl. 1131, 51 L. R. A. 657; *Livingston*

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v. Livingston, 4 Johns. Ch. (N. Y.) 287, 8 Am. Dec. 562; *Hoff v. Olson*, 101 Wis. 118, 70 Am. St. 903, 76 N. W. 1121; *Knauf etc. Co. v. Elkhart Lake Sand etc. Co.*, 153 Wis. 306, 141 N. W. 701, 48 L. R. A., N. S., 744.)

BUDGE, C. J.—This is an appeal from an order of the trial court denying a motion for a new trial; no appeal was taken from the judgment. The facts are: On and prior to Feb. 21, 1911, respondent was in the possession of and was the owner of certain lode mining claims in Lemhi county, location notices of which are recorded in the office of the recorder of that county; on said date the respondent gave appellant his promissory note in writing, dated February 21, 1911, for the sum of \$2,210, payable two years after its date, with interest at the rate of 8 per cent per annum payable annually, and to secure the payment thereof gave appellant a mortgage on the said claims, which mortgage is also recorded in the office of the recorder of said county; on or about April 2, 1912, respondent gave appellant a power of attorney, authorizing and empowering him to sell and dispose of the said mining claims and permitting appellant to enter into the possession thereof, with the understanding that appellant should not sell said property for less than \$5,000, which was to be equally divided between respondent and appellant in case of a sale, and respondent's note and mortgage in that event were to be canceled and discharged.

The trial court found, and the finding is supported by the evidence, that appellant "with intent to defraud and deprive the plaintiff of his right, title and interest in said mining claims and the value and the market price thereof, did wrongfully and fraudulently and with intent to deprive the plaintiff of the title and value of the said claims, permit and allow one J. A. Nash to relocate all of the said claims on or about January 1, 1913, and thereby the plaintiff lost his title in and to the said claims."

On March 24, 1913, respondent commenced his action against appellant, setting forth the facts as above alleged, and the further fact that at the time of the giving of the power

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of attorney above referred to appellant undertook and agreed to do the assessment work on said claims and to deduct from the sale price, when the claims should be sold, a sum sufficient to reimburse him for whatever expense he might incur in doing the assessment work. His complaint contained a prayer for damages, and for a decree canceling the mortgage of record and requiring the appellant to deliver to him the said note, and decreeing both the note and mortgage null and void.

The answer put in issue the matters set forth in the complaint, and a cross-complaint was filed for the foreclosure of the said mortgage, to which respondent answered by setting up as a defense the fraud and connivance between appellant and the said Nash, as above set forth.

The cause was tried by the court and certain interrogatories were submitted to the jury upon which they returned their verdict. The general issue was not submitted to the jury. The court, in preparing his findings of fact, conclusions of law and judgment, adopted two of the findings of the jury upon the interrogatories and rejected one. It does not appear from the record that any objection was made by appellant to this method of procedure. So far as the record discloses, objection was taken for the first time when appellant filed his notice of intention to move for a new trial.

The court having denied and overruled appellant's motion for a new trial, this appeal was prosecuted and the following errors were assigned:

[a] The evidence is insufficient to support the judgment and findings.

[b] The findings of fact and conclusions of law and the judgment herein were made and entered by the court contrary to law, and in excess and beyond the authority vested in the court.

[c] The court erred in vacating and setting aside the special findings of the jury and entering a judgment contrary thereto.

As to the first assignment of error, without going into detail, we have to say that the record has been carefully ex-

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amined and the evidence appears amply sufficient to support the judgment and findings.

The second assignment of error involves the sole question of whether or not appellant was entitled to a jury trial on the general issue. It is true that a portion of respondent's cause of action was a claim for damages, which if it stood alone would undoubtedly entitle appellant to a jury trial, but in determining whether or not the parties are entitled to a jury, trial courts must look to the ultimate and entire relief sought. (*Johansen v. Looney and Oakes*, 30 Ida. 123, 163 Pac. 303.) Applying this test to the present case we find that in order for the court to render a judgment which would give complete and adequate relief, it would be necessary to decree the cancelation of the mortgage in question and the surrender of the note. Such relief could only be made available by the exercise of the equitable jurisdiction of the court. That courts of equity have jurisdiction of causes where it is sought to have canceled an instrument which ought not to be enforced or which might be used for a fraudulent or improper purpose, or which might be vexatiously litigated at a distance or time where the proper evidence to repel the same may have been lost or obscured, or when the other party may be disabled from contesting its validity with such ability and force as he can contest it at the present time, has long been held to be one of the fundamental principles of equity jurisprudence. (Story's Equity Jurisprudence, sec. 700; *Merritt v. Ehrman*, 116 Ala. 278, 22 So. 514; *Ferguson v. Fisk*, 28 Conn. 501; *Buxton v. Broadway*, 45 Conn. 540; *Fitzmaurice v. Mosier*, 116 Ind. 363, 9 Am. St. 854, 16 N. E. 175, 19 N. E. 180.) It appears, therefore, that this cause is clearly one cognizable in equity. This court has adhered to the rule that parties are not entitled to a jury trial in equitable actions. (*Christensen v. Hollingsworth*, 6 Ida. 87, 96 Am. St. 256, 53 Pac. 211; *Brady v. Yost*, 6 Ida. 273, 55 Pac. 542; *Shields v. Johnson*, 10 Ida. 476, 3 Ann. Cas. 245, 79 Pac. 391.)

In jurisdictions where the distinction between actions at law and suits in equity is still observed, the rule seems to be well settled that where it is competent for the court to grant

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the relief sought and it has jurisdiction of the subject matter, the objection to the adequacy of the remedy at law must be taken at the earliest opportunity and before the defendant enters upon a full defense. (*Reynes v. Dumont*, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. ed. 934; *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. ed. 1005; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 10 Sup. Ct. 604, 33 L. ed. 1021.)

Upon the issue made up by the cross-complaint and the answer thereto, appellant was clearly not entitled to a jury trial; that portion of the proceeding was simply a suit to foreclose a mortgage, and the rule is too well settled to require the citation of authorities, that a mortgage foreclosure is an equitable proceeding, in which neither party is entitled to a jury trial.

The third specification of error, namely, that the court erred in vacating and setting aside the special findings of the jury is equally untenable. The only purpose in submitting specific interrogatories to a jury is, first, in equitable actions to assist the court in finding the facts; and, second, in law actions to enable the court to determine whether or not the general verdict which they have rendered can be supported as a matter of law upon the facts as the jury find them. The court is not bound by the specific findings of a jury, but may disregard such findings when they are clearly against the evidence, and find the facts as shown by the evidence. (*Brady v. Yost, supra.*)

For the reasons given we have reached the conclusion that the action of the trial court in denying appellant's motion for a new trial was proper, and the order is therefore affirmed. Costs awarded to respondent.

Morgan and Rice, JJ., concur.

Points Decided.

(March 20, 1917.)

G. E. CORKER, Appellant, v. KITTIE S. COWEN,
Respondent.

[164 Pac. 85.]

STATUTORY CONSTRUCTION—PUBLIC OFFICERS—IMPROPER PERFORMANCE
OF DUTIES—PROCEEDINGS TO REMOVE—CAUSES FOR REMOVAL.

1. Where, under sec. 7459, Rev. Codes, authorizing the district court to entertain an information verified by the oath of any person against an officer within its jurisdiction accusing him of charging and collecting illegal fees or with having refused or neglected to perform his official duties, an information charges that the defendant knowingly, wilfully and intentionally failed, neglected and refused to perform her duties, but the record shows that defendant performed her duties, such an information was properly dismissed by the district court.

2. Where an information alleges that defendant knowingly, wilfully and intentionally charged and collected large sums of money for her services as clerk of a school board, in addition to the salary allowed her by law, but it appears that such sums of money were paid to her under a contract for services independent of her duties as said clerk, sec. 7459, Rev. Codes, does not apply.

3. Sec. 7459, Rev. Codes, in so far as it relates to the performance of official duties, is not designed to cover acts of officers amounting to a misfeasance, and such acts are not within the purview of said section. The section is aimed at nonfeasances, that is, failures on the part of officers to act at all, where an act is required by law.

[As to removal of officers for cause, see note in 135 Am. St. 250.]

APPEAL from the District Court of the Fourth Judicial District, for Elmore County. Hon. Chas. O. Stockslager, Judge.

Action to remove school trustee under the provisions of sec. 7459, Rev. Codes, and to recover penalty. *Judgment for defendant affirmed.*

W. C. Howie, for Appellant, relies on brief in *Corker v. Ake*.

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L. B. Green, K. I. Perky and Wyman & Wyman, for Respondent.

To believe that such charges can be brought under sec. 7459, Rev. Codes, is not to observe the difference between non-feasance and misfeasance. (*Daugherty v. Nagel*, 28 Ida. 302, 154 Pac. 375; *Collman v. Gordon*, 27 Ida. 351, 149 Pac. 294; *Corker v. Pence*, 12 Ida. 152, 85 Pac. 388.)

The section of the statutes here invoked was intended to punish dishonest officials and those who refuse or neglect to perform their official duties. It was never intended as a means of harassing those who were honestly seeking to do their best. (*Ponting v. Isaman*, 7 Ida. 581, 65 Pac. 434; *Osborne v. Ravenscraft*, 5 Ida. 612, 51 Pac. 618.)

PER CURIAM.—This action was brought under sec. 7459, Rev. Codes, for the purpose of depriving respondent of her office as member and clerk of the board of school trustees of school district No. 6, of Elmore county, and obtaining a judgment of five hundred dollars against said respondent and in favor of appellant, the informer. Two separate causes of action are set out in the verified information which was filed by appellant on February 24, 1914.

The first cause of action, after setting out the respondent's election as a member and clerk of said board in 1909 and her continual service since that date, alleges that for the years ending July 1, 1912, and July 1, 1913, the respondent knowingly, wilfully and intentionally charged and collected from said school district large sums of money as compensation for her services as said clerk, in addition to the amount allowed her by law for the taking of the census of said school district.

The second cause of action, after alleging the election and service of the respondent as a member and clerk of the said board of school trustees, as above stated, proceeds to enumerate instances in which the respondent is alleged to have failed to perform the duties required of her by law. It is alleged that the respondent and one other, comprising a majority of said board, knowingly, wilfully and intentionally failed to make a report on the 1st day of July, 1912, and on the 1st

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day of July, 1913, as required by sec. 61, c. 159, Sess. Laws, 1911, but made a pretended report, which was not properly itemized, contained many misstatements and made no reference to other sums due and owing to the said district; that she knowingly, wilfully and intentionally failed, neglected and refused to submit to competitive bids, as required by subd. g, sec. 58, c. 115, Sess. Laws 1913, certain construction and repair work of and pertaining to said school district; and that respondent, as clerk of said board, has failed, neglected and refused to keep the records and minutes of said board's proceedings as required by law.

Upon the strength of this information the court issued a citation to the respondent, who thereupon filed her answer, in effect denying all the allegations of said information. The cause came on regularly for trial before the court on March 10, 1914. A trial was thereupon had and the information was dismissed by the trial court, for the reason that the charges contained therein were not sustained by the evidence.

This is an appeal from the judgment of dismissal of said information. The appellant relies upon the following assignments of error, to wit:

"The court erred in his statement, which may be termed his findings, in not passing upon the question as to whether or not the defendant had charged and collected illegal fees for services rendered by her, in not finding as to whether or not she had let the contracts spoken of without calling for sealed bids, and whether or not she had failed to keep proper records as required by law.

"The court erred in not holding that the penalties of the law should be imposed upon the defendant, for her failure to comply with the law."

As to those matters referred to in the first paragraph of appellant's assignment of errors this court is without jurisdiction, for the reason that the errors there assigned have reference to the opinion of the trial court, which though incorporated into the record, is not properly a part thereof under sec. 4818, Rev. Codes, as amended by Sess. Laws 1911, p. 375, which specifies the contents of the record on appeal.

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(*Graham v. Linehan*, 1 Ida. 780; *Williams v. Boise Basin Min. etc. Co.*, 11 Ida. 233, 81 Pac. 646; *Taylor v. McCormick*, 7 Ida. 524, 64 Pac. 239; *Stewart Mining Co. v. Ontario Mining Co.*, 23 Ida. 724, 132 Pac. 787; *Smith v. Faris Kest Construction Co.*, 27 Ida. 407, 150 Pac. 25.) It is not within the province of this court on an appeal to question the soundness of the trial court's reasons in giving its decisions, for they cannot affect the judgment itself, however enlightening they may be to counsel contemplating an appeal. (*Pennsylvania Co. v. Versten*, 140 Ill. 637, 30 N. E. 540, 15 L. R. A. 798.)

Under appellant's second assignment of error, above quoted, we think may be considered the merits of this appeal. However, it is not the purpose of the court to discuss all of the details appearing in the record and raised by the briefs of counsel, for the reason that practically every vital issue raised on this appeal has been passed on previously by this court, in cases where the surrounding circumstances were very similar to the one at bar.

The statute in question in effect provides that any officer found "guilty of charging and collecting illegal fees for services rendered or to be rendered in his office, or [who] has refused or neglected to perform the official duties pertaining to his office," must be deprived of said office and a judgment of five hundred dollars entered against him and in favor of the informer. The object of this statute is to enable an individual, having the knowledge that an officer is using his official position as a medium of extortion and wrong, to oust said official; the provision for a judgment of five hundred dollars in favor of the informer being merely incidental to the main object. (*In re Smith v. Ling*, 68 Cal. 324, 9 Pac. 171.) Its provisions are penal and very severe. (*Müller v. Smith*, 7 Ida. 204, 61 Pac. 824; *Triplett v. Munter*, 50 Cal. 644; *Thurston v. Clark*, 107 Cal. 285, 40 Pac. 435; *Kilburn v. Law*, 111 Cal. 237, 43 Pac. 615.)

Under the charge of collection of illegal fees, the appellant alleges that respondent, in addition to her salary, annually received seventy-five dollars, under an agreement with the

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school board. This was for making copies of the census report. It is claimed that this is an illegal contract and within the purview of the statute in question. This point has been decided by this court in the case of *McRoberts v. Hoar*, 28 Ida. 163, 152 Pac. 1046, where the court, though finding that a contract, somewhat similar to that alleged in the instant case, was void *ab initio*, yet held that such an illegal contract was not within the spirit of section 7459, Rev. Codes.

It is contended at some length that the respondent failed, neglected and refused to perform her official duties, in that she failed to make two annual reports, as required by law. But it is conceded that she did make the reports. Having done so there was not a failure, neglect or refusal upon her part to perform her official duties in this respect, although the reports may not have been technically correct, and therefore she would not be subject to removal from office or the payment of the penalty prescribed under the provisions of sec. 7459, *supra*. (*Corker v. Pence*, 12 Ida. 152, 85 Pac. 388.) In that case it was shown that the board of equalization had failed completely in assessing the property of their county at its fair cash value, but it was held that the fact that they had met and acted was sufficient to clear them of the accusations with which they were charged. The court also stated that if the parties had acted corruptly they would not be within the purview of sec. 7459, *supra*, but rather within sec. 7445, Rev. Codes.

While the wording of the information in the instant case follows the words of the statute very closely, and if the appellant had proven all that he alleged, the information no doubt would not have been dismissed, still without discussing separately the alleged wrongful actions of respondent in connection with other members of the board, namely, her failure and neglect to submit certain work done for and on behalf of the school district to competitive bids; the building of the temporary Reverse schoolhouse without submitting the construction thereof to competitive bids; and her alleged failure and neglect to keep proper records of the proceedings of said

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school district and proper minutes of the meetings of said board; suffice it to say, the evidence offered in support of these various charges is not, in our opinion, sufficient to warrant us in reversing the judgment of the trial court. And even if true would not establish the charges made against respondent, namely, that she was guilty of charging and collecting illegal fees for services rendered or to be rendered in her office or that she refused to perform the official duties pertaining to her office. The acts complained of, if proven, would constitute, not a nonfeasance in office, but a misfeasance in office, and would not come within the provisions of sec. 7459, *supra*. (*Daugherty v. Nagel*, 28 Ida. 302, 154 Pac. 375; *Collman v. Gordon*, 27 Ida. 351, 149 Pac. 294.)

Judgment of the trial court is sustained. Costs awarded to respondent.

(March 20, 1917.)

C. E. CORKER, Appellant v. F. P. AKE, Respondent.

[164 Pac. 87.]

APPEAL from the District Court of the Fourth Judicial District, for Elmore County. Hon. Chas. O. Stockslager, Judge.

The facts in the above case are substantially the same as in the case of *Corker v. Cowen*, *ante*, p. 213, 164 Pac. 85.

W. C. Howie, for Appellant.

Clerks of school boards are not permitted to enter into any other agreements or allowances for compensation, nor be pecuniarily interested in any other contract made by the board (Sess. Laws 1911, p. 507, sec. 58g), and they are not per-

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mitted to collect anything other than allowed by law and fixed. (*Clarke v. School Dist.*, 84 Ark. 516, 106 S. W. 677.)

E. M. Wolfe, L. B. Green and Perky & Brinck, for Respondent.

Respondent could not be removed from office under the provisions of sec. 7459, Rev. Codes. (*Corker v. Pence*, 12 Ida. 152, 85 Pac. 388.)

The failure to properly itemize a claim or to furnish vouchers therewith is not a cause for the removal of an officer under the provisions of said section 7459. (*Siebe v. Superior Court*, 114 Cal. 551, 46 Pac. 456; *Triplett v. Munter*, 50 Cal. 644; *Collman v. Wanamaker*, 27 Ida. 342, 149 Pac. 292.)

PER CURIAM.—By stipulation, the above-entitled case is submitted with the case of *Corker v. Cowen*, ante, p. 213, 164 Pac. 85, the record in the latter case to constitute the record in the above-entitled case, with the following exception, to wit:

“That either of the parties to this action may introduce such additional evidence as they shall desire, and shall offer such modifications and reoffers of evidence as they shall desire.”

At the trial certain additional evidence was introduced by both parties to this action, but we do not think that any of the evidence so introduced materially differentiates the instant case from that of *Corker v. Cowen*, supra. On the authority of that case the judgment of the district court is affirmed. Costs awarded to respondent.

Argument for Appellants.

(March 21, 1917.)

J. H. MOORE and DANIEL F. REGAN, Respondents, v.
KEYSTONE DRILLER COMPANY, a Corporation, and
H. C. VANAUSDELN, Appellants.

[163 Pac. 1114.]

CHattel Mortgages—COMITY BETWEEN STATES.

If personal property situated in a foreign state is there encumbered by a mortgage duly executed and recorded so as to create a valid lien thereon and if it is thereafter, with the consent of the mortgagee, removed into Idaho and is here sold to a purchaser who has no knowledge of the encumbrance, such purchaser takes title which is not subject to the lien of the mortgage.

[As to removal of mortgaged chattels to another state and effect of same on the lien, see note in 30 Am. St. 324.]

APPEAL from the District Court of the Fourth Judicial District, for Twin Falls County. Hon. Wm. A. Babcock, Judge.

Action to enjoin sale of mortgaged property. Judgment for plaintiffs. *Affirmed.*

James H. Wise, for Appellants.

Possession of personal property is mere *prima facie* evidence of ownership. If the holder of the property has recently come from an adjoining state, there may be a mortgage upon the property in that state, and a purchaser or creditor must exercise his diligence by inquiring there whether the property is encumbered. (Jones on Chattel Mortgages, 260A; *Studebaker Bros. Co. v. Mau*, 13 Wyo. 358, 110 Am. St. 1001, 80 Pac. 151; *Shapard v. Hynes*, 104 Fed. 449, 45 C. C. A. 271,

On failure to renew chattel mortgage as affecting purchase or encumbrancer of property before lien of mortgage had expired, see note in 47 L. R. A., N. S., 668.

Authorities discussing the question of removal of mortgaged property from state with consent of mortgagee, as affecting his lien, see note in 64 L. R. A. 356; 6 L. R. A., N. S., 940; 35 L. R. A., N. S., 385.

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52 L. R. A. 675; *Jones v. North. Pac. Fish & Oil Co.*, 42 Wash. 332, 114 Am. St. 131, 84 Pac. 1122, 6 L. R. A., N. S., 940.)

The removal of a mortgagor from town or county in which he resided when the mortgage was executed and where it was duly recorded, and the taking of the mortgaged property with him does not invalidate the record of the mortgage or necessitate the recording of it again in the town or county to which he has moved. (*Jones on Chat. Mort.*, sec. 260; *Brigham v. Weaver*, 6 Cush. (60 Mass.) 298; *Barrows v. Turner*, 50 Me. 127; *Hoit v. Remick*, 11 N. H. 285; *Pease v. Odenkirchen*, 42 Conn. 415; *Elson v. Barrier*, 56 Miss. 394; *Cool v. Roche*, 20 Neb. 550, 31 N. W. 367; *Grand Island Banking Co. v. Frey*, 25 Neb. 66, 13 Am. St. 478, 40 N. W. 599; *Hudmon v. Du Bose*, 85 Ala. 446, 5 So. 162, 2 L. R. A. 475; *Griffith v. Morrison*, 58 Tex. 46; *Keenan v. Stimson*, 32 Minn. 377, 20 N. W. 364; *Harris v. Allen*, 104 N. C. 86, 10 S. E. 127; *First Nat. Bank v. Weed*, 98 Mich. 357, 373, 50 N. W. 864; *Bailey v. Costello*, 94 Wis. 87, 68 N. W. 663; *Farmers & Merchants' State Bank v. Sutherlin*, 93 Neb. 707, Ann. Cas. 1914B, 1250, 141 N. W. 827, 46 L. R. A., N. S., 95.)

The law of the place of contract, when this is also the place where the property is, governs as to the nature, validity, construction and effect of a mortgage which will be enforced in another state, as a matter of comity, although not executed or recorded according to the requirements of the law of the latter state. (*Jones on Chat. Mort.*, 5th ed., sec. 299; *Blyth & Fargo Co. v. Houtz*, 24 Utah, 62, 66 Pac. 611; *Handley v. Harris*, 48 Kan. 606, 30 Am. St. 322, 29 Pac. 1145, 17 L. R. A. 703; *Ramsey v. Glenn*, 33 Kan. 271, 6 Pac. 265; *Douglas v. Douglas*, 22 Ida. 336, 125 Pac. 796.)

C. M. Booth, for Respondents.

The Keystone Driller Co. practically waived their lien as against the purchaser, Daniel E. Regan, as they knew of the removal of the property from Missouri to Idaho, and knew that the property was located in Twin Falls, Idaho, for a period of over two years, during which time they had failed to file their mortgage for record in Twin Falls county.

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(*Adams v. Fellers*, 88 S. C. 212, 70 S. E. 722, 35 L. R. A., N. S., 385; *Pennington County Bank v. Bauman*, 87 Neb. 25, 126 N. W. 654; *F. E. Creelman Lumber Co. v. Lesh*, 73 Ark. 16, 3 Ann. Cas. 108, 83 S. W. 320.)

It was through the fault of appellant that the respondent Moore was able to have as to this property all the *indicia* of ownership in Twin Falls county, and by reason of his *indicia* of ownership the respondent Regan had a right to believe that Moore could legally part with title. (*Hare v. Young*, 26 Ida. 682, 146 Pac. 104.)

MORGAN, J.—On April 28, 1909, respondent, Moore, executed and delivered to appellant, Keystone Driller Company, hereinafter called the company, three promissory notes for \$284.97 each in Lawrence county, Missouri, and at the same time and place, to secure the payment thereof, executed, acknowledged and delivered to the company a chattel mortgage upon a drilling outfit situated in that county and state. The mortgage was duly recorded in accordance with the laws of the state of Missouri relating to chattel mortgages on April 30, 1909, and shortly thereafter Moore removed the property to Twin Falls county, Idaho, and on August 1, 1911, sold it to respondent, Regan, in that county. At the time of this sale the mortgage had not been recorded in Idaho and Regan had no notice of any claim or lien of the company to or upon the property. On December 10, 1913, the company instituted proceedings, by affidavit and notice, to foreclose the mortgage and appellant, Vanausdeln, the sheriff of Twin Falls county, was acting under such foreclosure proceedings when enjoined by the court.

It is alleged in the complaint, and denied in the answer, that the removal of the chattels from Missouri was effected with the knowledge and consent of the company, and that Moore, during the year 1909, after the removal, advised it to file a copy of the mortgage for record in Twin Falls county. However, the only testimony offered upon that point supports the allegations of the complaint.

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The court rendered judgment in favor of respondents, decreeing that Regan was the owner of the property and that it was free of any lien in favor of the company, and issued a permanent injunction restraining appellants from taking and selling the same. This appeal is from the judgment.

By reason of comity between states the chattel mortgage executed and recorded in Missouri must be treated as a valid lien in this state, and, after the removal of the property to this state, a purchaser here takes title subject to the lien of the mortgage recorded in Missouri, even though it has not been recorded here. (*Smith v. Consolidated Wagon & Machine Co.*, ante, p. 148, 163 Pac. 609, and cases therein cited.)

The only question to be decided in this case is whether or not this comity is to be extended in instances where the removal of the chattels was effected with the knowledge and consent of the mortgagee. Most of the decisions holding to the rule of comity are silent as to the effect the consent by the mortgagee to the removal of the property would have upon the application of the rule. The decisions which do discuss this phase of the question are hopelessly divided. (5 R. C. L., pp. 398-400.)

The case of *Shapard v. Hynes*, 104 Fed. 449, 45 C. C. A. 271, 52 L. R. A. 675, is sometimes referred to as an authority holding that the rule of comity is extended in cases where the mortgaged chattels were removed with the consent of the mortgagee, but in that case the decision of the court upon that point was not necessary, as the question of consent was not in issue.

In the case of *F. E. Creelman Lumber Co. v. Lesh*, 73 Ark. 16, 3 Ann. Cas. 108, 83 S. W. 320, the doctrine of comity was adhered to, but Mr. Justice Wood, who wrote the opinion, stated that the court would not decide what effect consent to removal would have as that question had not been raised. Hill, C. J., in a specially concurring opinion, however, deemed it advisable to settle the question, and held that consent to removal does not qualify the rule.

We hold, however, that when we recognize, as a valid lien, a chattel mortgage given upon property in another state,

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which property is thereafter removed to Idaho without the knowledge or consent of the mortgagee, we have accorded the sister state the full measure of courtesy contemplated by the rule of comity. To go further and hold that the rule applies where the removal was effected with the mortgagee's consent, that the mortgage need not be recorded here, but that the innocent purchaser is chargeable with notice which the mortgagee could have and in good conscience should have given him and did not, is beyond the spirit of the rule and in violation of the rights of citizens of our own state. By such consent the mortgagee negligently places it in the power of the mortgagor to deceive and defraud innocent people in the state into which the property is taken. He should be and is deemed to have waived his lien against such innocent parties upon the principle that where one of two persons must suffer by reason of the wrongful act of a third, the injury must be borne by him by whose conduct the wrongful act has been made possible.

The following are authorities holding that the rule of comity does not apply where the removal was with the consent of the mortgagee. (*Jones v. North Pacific Fish & Oil Co.*, 42 Wash. 332, 114 Am. St. 131, 84 Pac. 1122, 6 L. R. A., N. S., 940; *Blythe v. Crump*, 28 Tex. Civ. 327, 66 S. W. 885; *Greene v. Bentley*, 114 Fed. 112, 52 C. C. A. 60; *Pennington County Bank v. Bauman*, 87 Neb. 25, 126 N. W. 654; *Newsum v. Hoffman*, 124 Tenn. 369, 137 S. W. 490.)

The judgment appealed from is affirmed. Costs are awarded to respondents.

Budge, C. J., and Rice, J., concur.

Argument for Plaintiff.

(March 23, 1917.)

JAMES F. CALLAHAN, Plaintiff, v. Honorable ROBERT N. DUNN, One of the Judges of the District Court of the Eight Judicial District, Defendant.

[164 Pac. 356.]

DIVORCE—MOTION FOR ALIMONY—PLACE OF HEARING.

1. A motion for alimony and suit money in an action for divorce must be heard in the county or district in which the action is pending.

2. An order for alimony and suit money cannot be made in an original proceeding in this court instituted for the purpose of prohibiting a trial judge from exceeding his powers in a divorce action.

[As to suits for alimony and when same maintainable independently of suits for divorce, see note in 77 Am. St. 228.]

APPLICATION for a Writ of Prohibition to Honorable Robert N. Dunn, one of the Judges of the Eighth Judicial District. Writ allowed.

W. H. Hanson and H. L. Heward, for Plaintiff.

As a general rule, a judge cannot make orders in a cause pending in a court outside of the limits of his territorial jurisdiction. (23 Cyc. 560.)

The legislature of Idaho has conferred no power upon a judge to hear a motion or to take any steps in a cause pending in another district while resident in and acting in his own district. The only two sections of the codes pertinent on this question are secs. 2886 and 3894.

If they can drag us to Sandpoint to oppose this motion we can also be haled to Pocatello, Malad or St. Anthony to argue the demurrer we have filed to their second amended answer and cross-complaint. Such was never the intention of the legislature. It is not the object of the law or the courts to oppress litigants or punish plaintiffs for coming into court. (*Goodwin v. Monds*, 101 N. C. 354, 7 S. E. 793; *McNeill v. Hodges*, 99 N. C. 248, 6 S. E. 127; *Cook v. Walker*, 15 Ga.

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457; *Simmons v. Cooledge*, 95 Ga. 50, 21 S. E. 1001; *Martin v. O'Brien*, 34 Miss. 21; *Dobbs v. State*, 5 Okl. Cr. 475, 114 Pac. 358, 115 Pac. 370.)

Under the provisions of sec. 4995, Rev. Codes, a writ of prohibition will be issued upon proper complaint or petition to arrest proceedings, which are without or in excess of the jurisdiction of such tribunal, in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. (*Cronan v. First Judicial District Court*, 15 Ida. 184, 96 Pac. 768; *Hayne v. Justice's Court*, 82 Cal. 284, 16 Am. St. 114, 23 Pac. 125; *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. 192, 24 Pac. 121, 10 L. R. A. 627; *Stoddard v. Superior Court*, 108 Cal. 303, 41 Pac. 278.)

In Idaho and states having a similar appellate practice there is and can be no appeal from an order in a divorce case for the payment of alimony *pendente lite*, suit money or counsel fees. (*Wyatt v. Wyatt*, 2 Ida. 236, 10 Pac. 228.)

An application of this character must be first made to the district court in which the action is pending, and must be accompanied by a showing of necessity, which is noticeably lacking here. (*Roby v. Roby*, 9 Ida. 371-374, 3 Ann. Cas. 50, 74 Pac. 957; 1 R. C. L., sec. 47, p. 901; *Bronk v. State*, 43 Fla. 461, 99 Am. St. 119, 31 So. 248; *St. Louis K. & S. Ry. Co. v. Wear*, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341; *Cizek v. Cizek*, 69 Neb. 797, 5 Ann. Cas. 464-467, 96 N. W. 657, 99 N. W. 28; *Chapman v. Parsons*, 66 W. Va. 307, 135 Am. St. 1033, 19 Ann. Cas. 453-454, 66 S. E. 461, 24 L. R. A., N. S., 1015; *Wilson v. Wilson*, 49 Iowa, 544; *Corder v. Sparke*, 37 Or. 105, 51 Pac. 647; *Maxwell v. Maxwell*, 67 W. Va. 119, 67 S. E. 379, 27 L. R. A., N. S., 712.)

H. H. Parsons and Featherstone & Fox, for Defendant.

A necessitous wife, whether plaintiff or defendant, is entitled to such a reasonable allowance from husband, in addition to alimony *pendente lite*, as shall place her, all things considered, on a parity with him as to the means of litigating their dispute. (*Taylor v. Taylor*, 70 Or. 510, 134 Pac. 1183, 140 Pac. 999; *Courtney v. Courtney*, 4 Ind. App. 221, 30 N. E.

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914; *Davis v. Davis*, 141 Ind. 367, 40 N. E. 803; *Green v. Green*, 40 How. Pr. (N. Y.) 465; *Rose v. Rose*, 109 Cal. 544, 42 Pac. 452; *Szymanski v. Szymanski*, 151 Wis. 145, 138 N. W. 53; *Beaulieu v. Beaulieu*, 114 Minn. 511, 131 N. W. 481; *Varney v. Varney*, 52 Wis. 120, 38 Am. Rep. 726, 8 N. W. 739; *Kiddle v. Kiddle*, 90 Neb. 248, Ann. Cas. 1913A, 796, 133 N. W. 181, 36 L. R. A., N. S., 1001.)

RICE, J.—James F. Callahan instituted proceedings in the district court of the first judicial district, in and for the county of Shoshone, against Helen Elizabeth Callahan for the purpose of obtaining a decree of divorce and settlement of property rights between the parties.

On January 2, 1917, upon the application of the defendant in that action, an order was entered changing the place of trial of said cause “to the district court of the eighth judicial district of the state of Idaho and to the Honorable Robert N. Dunn, one of the judges of the said district court.”

On January 10, 1917, James F. Callahan perfected an appeal from the order changing the place of trial. On the same date Helen Elizabeth Callahan served upon the attorneys for James F. Callahan in said action a second amended answer and cross-complaint and affidavits in support of a motion and notice of motion for suit money, attorney’s fees and temporary alimony. The pleadings and other papers so served were all entitled in the district court of the first judicial district of Idaho, in and for the county of Shoshone.

The notice was to the effect that the defendant would move the Honorable Robert N. Dunn, one of the Judges of the eighth judicial district of the state of Idaho, to grant the order. The concluding portion of the notice is as follows: “The said motion will be made before the said Honorable Robert N. Dunn, Judge of the district court of the eighth judicial district, as aforesaid, under the provisions of section 3894 of the Revised Codes of the State of Idaho, and by reason of the absence of the said Honorable William W. Woods, Judge of the above entitled court from the state of Idaho, said absence being evidenced, among other things, by the cer-

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tificate of the clerk of the above entitled court, which said certificate is also hereunto annexed, hereby referred to and made a part hereof."

The certificate referred to states that the Honorable William W. Woods, Judge of the first judicial district of the state, was absent from the district and the state, having left on January 2, 1917. The plaintiff was notified that the motion would be heard on January 20, 1917, at chambers in the courthouse in the city of Wallace, Shoshone county, Idaho.

It further appears that Judge Dunn was unable to hear the motion on the day specified in the notice, and orally notified the plaintiff's attorneys that the hearing would not be had until January 29th. On January 16, 1917, Judge Dunn made the following order: "It is ordered that the time of the notice of motion of the defendant in the above-entitled action for temporary alimony, suit money and attorney's fees be and the same hereby is shortened, and that the said motion be set for hearing and heard before the undersigned Judge at chambers in the courthouse at Sandpoint, Bonner county, Idaho, on the 20th day of January, A. D. 1917, at 2 o'clock in the afternoon of said day, or as soon thereafter as counsel can be heard."

The said order was made at chambers at Sandpoint, in the county of Bonner and within the eighth judicial district of the state. It was served on the attorney for James F. Callahan on January 17, 1917. On January 18, 1917, it was stipulated by the attorneys for the parties to said action that the time for the hearing might be fixed for January 24, 1917, without the said James F. Callahan waiving any of his rights, legal or otherwise, and saving all his right to question and challenge the jurisdiction of the said Robert N. Dunn to hear such matter at said or any time or place. Upon application of James F. Callahan an alternative writ of prohibition was issued out of this court to the defendant, directing him to show cause why such alternative writ should not be made absolute.

Helen Elizabeth Callahan gave her notice of application for alimony, suit money and attorney's fees upon the theory that the original divorce action is still pending in the district court

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of the first judicial district, in and for the county of Shoshone. The substance of the notice of motion expressly states that the matter is to be heard before the Honorable Robert N. Dunn, one of the judges of the eighth judicial district, on account of the absence of the judge of the first judicial district, and pursuant to sec. 3894, Rev. Codes.

Said section of the Revised Codes, as amended Sess. Laws 1911, p. 676, provides: "In case of a vacancy in the office of any District Judge, or in his absence from the Judicial District or State, or his sickness or inability to act from any cause, motions may be made before, or orders granted by, any other District Judge, who shall have the same jurisdiction under this chapter as though he was the judge of said district, and orders, writs and judgments entered by such judge shall be made matters of record as herein directed and have the same effect as though made by the judge of said district."

This notice precludes any contention that the matter was pending in any county comprising the eighth judicial district. It was wholly insufficient to empower any court of the eighth judicial district, or any judge thereof, to hear the motion or make an order therein. In view of this condition of the record the consideration of this case will proceed upon the theory that the order changing venue did not divest the district court of Shoshone county of jurisdiction, and that the matter is still pending therein.

Under sec. 3894, as amended, jurisdiction is conferred upon a judge of any other district, to the same extent as the judge of the district for whom he is acting. He is also bound by the same limitations.

The action of Judge Dunn in setting the hearing at Sandpoint, in Bonner county, was not taken pursuant to the original notice served in the case of *Callahan v. Callahan*, which notified plaintiff in that action that the motion would be heard on January 20, 1917, at chambers in the courthouse in the city of Wallace, Shoshone county, Idaho. This action assumed that under the provisions of sec. 3894, Rev. Codes, as amended, in the absence of a district judge from his district,

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a district judge of any district in the state might hear the motion out of the district in which the action was pending.

Sec. 4881, Rev. Codes, is as follows: "Motions must be made in the county in which the action is pending, or in any county in the same judicial district. Orders made out of court may be made by the judge of the court in any part of the State."

This section was first enacted in Idaho by the Eleventh Territorial Session (Chap. XLIV, Laws 1881, p. 158). Sec. 58 of this same act, enumerates the powers of district judges at chambers, and reads as follows: "District Judges, at chambers, may grant all orders and writs which are usually granted in the first instance upon *ex parte* applications, and may, at chambers, hear and dispose of such writs and of motions for new trials, and try and determine writs of review, mandate and prohibition, and may hear applications to discharge all such orders and writs. In case of vacancy in the office of any District Judge, or his absence from the Territory, motions may be made before and orders granted by any other District Judge."

Since the enactment of said sections, the powers of district judges at chambers in Idaho have been greatly enlarged. (See Sess. Laws 1905, p. 7, and sec. 3890, Rev. Codes.)

The same act which enlarged the powers of district judges at chambers contained what is now sec. 3893, Rev. Codes, which is as follows: "Unless otherwise specified by the District Judge, all chamber matters shall be heard at the Judge's chambers in the county where said Judge resides, but said Judge is hereby granted jurisdiction and power to sit at chambers in any other county in his district than that in which he lives:" (See Sess. Laws 1905, p. 7.)

It would seem that sec. 3893 was intended to apply to judges of the district, and that when a judge of another district, under sec. 3894, assumes to act for an absent or disabled judge, he is subject to the limitations prescribed by sec. 3893.

In the case of *Matthews v. Superior Court*, 68 Cal. 638, at p. 641, 10 Pac. 128, the court construed sec. 1004 of the California Code of Civ. Procedure, which is substantially the

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same as sec. 4881 of our codes, in the following language: "Orders made out of court may be made by the judge of the court in any part of the state (Code Civ. Procedure, sec. 1004). Motions referred to under sec. 1004, just cited, which by it are required to be made in the county, or city and county in which the action is pending, in our opinion, are such motions as must be heard at court and not *ex parte* motions which may be heard and passed on at chambers."

We think that the proper construction of these various statutory provisions requires that all motions of which notice must be given, and which may be contested, must be made and heard in the county in which the action is pending or in any county in the same judicial district, and that orders which may be made in any part of the state, as provided by sec. 4881, are *ex parte* orders which may be made without notice.

We conclude, therefore, that Judge Dunn would not have power to hear the motion at Sandpoint, without the confines of the first judicial district.

Helen Elizabeth Callahan has filed a motion to quash the writ of prohibition in this action, and the service thereof, and has asked this court for an allowance of \$2,000 as attorney's fees for prosecuting this matter, and the further sum of \$250 for costs and disbursements necessarily incurred herein. She has supported her application for attorney's fees and expense money by her own affidavit and that of her attorneys.

An examination of secs. 2662 and 2673, Rev. Codes, clearly shows that original jurisdiction in the matter of granting alimony and suit money in connection with divorce actions is vested in the district courts and the judges thereof at chambers. It is clear that this court does not have original jurisdiction in such matters. Such orders are made by this court only where it is necessary to a complete exercise of its appellate jurisdiction. (*Roby v. Roby*, 10 Ida. 139, 77 Pac. 213; *Stoneburner v. Stoneburner*, 11 Ida. 603, 83 Pac. 938; *Spofford v. Spofford*, 18 Ida. 115, 108 Pac. 1054.)

This is not an action for divorce. Helen Elizabeth Callahan is not a party to this action. There is no provision in the statute for the allowance of attorney's fees in an action

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of this nature. (*Jenkins v. Commercial Nat. Bank*, 19 Ida. 290, 113 Pac. 463.)

The alternative writ heretofore issued by this court must be made absolute. Costs not awarded to either party.

Budge, C. J., and Morgan, J., concur.

(March 24, 1917.)

GOODING HIGHWAY DISTRICT OF GOODING COUNTY, STATE OF IDAHO, a Corporation, Appellant, v. IDAHO IRRIGATION COMPANY, LTD., a Corporation, Respondent.

[164 Pac. 99.]

HIGHWAYS—PUBLIC DOMAIN—COUNTY COMMISSIONERS.

1. Power to establish highways is vested, inherently, in the legislature, and in order for a board of county commissioners to accept, on behalf of the state, the grant of right of way over the public domain expressed in sec. 2477, Rev. Stats. U. S., or to lay out a road across private property, it must substantially conform to the state law delegating this power to it and prescribing the manner in which it may be exercised. A mere order, made and entered of record by the board, declaring certain section lines to be public highways, is not a substantial compliance with the law.

2. The owner of a ditch or canal constructed across an established highway must provide a bridge, at the point of intersection, for the use and benefit of the public, but if the ditch or canal is constructed prior to the establishment of the road which intersects it, the expense of building the bridge must be borne by the county or highway district to which the road belongs.

[As to duty to maintain bridge on highway not erected by highway authorities, see note in *Ann. Cas.* 1914A, 550.]

APPEAL from the District Court of the Fourth Judicial District, for Lincoln County. Hon. Chas. O. Stockslager, Judge.

Argument for Appellant.

Suit to recover the cost of construction of bridges over canals of defendant. Judgment for defendant. *Affirmed.*

A. F. James, for Appellant.

Sec. 2477, U. S. Rev. Stats., reads: "The right of way for the construction of highways over the public lands not reserved for public purposes is hereby granted," and, as long as the land is public land, a mere declaration by the legislature that certain section lines are highways is sufficient to establish them as such. This is true where the statutes provide for the presentation of a petition, the appointment of viewers, etc., as a prerequisite to the establishment of highways. The theory is that the declaration is an acceptance of the grant of the government and sufficient unless private adverse rights in the land affected have intervened in the meantime. (*Tholl v. Koles*, 65 Kan. 802, 70 Pac. 881; *Wells v. Pennington*, 2 S. D. 1, 39 Am. St. 758, 48 N. W. 305; *Wallowa County v. Wade*, 43 Or. 253, 72 Pac. 793; *Molyneux v. Grimes*, 78 Kan. 830, 98 Pac. 278; *Schwerdtle v. Placer County*, 108 Cal. 589, 41 Pac. 448; *Walbridge v. Board of Commrs.*, 74 Kan. 341, 86 Pac. 473; *Mills v. Glasscock*, 26 Okl. 133, 110 Pac. 377; *Board of Commrs. v. Johnson*, 76 Kan. 65, 90 Pac. 805.)

Sec. 934, Rev. Codes, which was in force at the time of the making of the order involved in this case, provides that if written consent be filed with the county commissioners, a mere order is sufficient to establish a highway.

Even construed in connection with this section of our code, there was sufficient compliance, in that the written consent was contained in the Carey Act contract which was, as required by law, of record in the office of the county recorder of the then Lincoln county. With this contract containing the consent of the entrymen to establish highways on section lines over their land, thus recorded in the office of the recorder of the county, and a matter of public record, there has been a sufficient compliance with sec. 934, and the order of the county board as made was sufficient to establish lawful highways along the section lines named in the order.

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Oppenheim & Hodgin, E. A. Walters and V. P. Coffin, for Respondent.

In laying out roads under the provisions of secs. 916 to 935, inclusive, Rev. Codes, the board of county commissioners acts as a board of limited jurisdiction. (*Canyon Co. v. Toole*, 9 Ida. 561, 75 Pac. 609; *Prothero v. Board of County Commrs.*, 22 Ida. 598, 127 Pac. 175; *Babcock v. Welsh*, 71 Cal. 400, 12 Pac. 337; 7 Am. & Eng. Ency. Law, 999; *Reed v. Harlan*, 2 Ohio Dec. (Reprint) 553; 11 Cyc. 398, note 98.) It only acquires jurisdiction upon the presentation to the board of a proper and sufficient petition. (*Canyon County v. Toole*, *supra*; *Humboldt County v. Dinsmore*, 75 Cal. 604, 17 Pac. 710; *Hill v. Board of Supervisors*, 95 Cal. 239, 30 Pac. 385; 37 Cyc. 71.)

The duties and liabilities of the respective parties, where ditches, canals or conduits cross county or state roads, are prescribed by sec. 3310, Rev. Codes. (*MacCammelly v. Pioneer Irr. Dist.*, 17 Ida. 415, 105 Pac. 1076; *Boise City v. Boise City Canal Co.*, 19 Ida. 717, 115 Pac. 505.)

In California sec. 551 of the Civil Code is similar to sec. 3310 of our Revised Codes, and the same rule is established in that state. (*City of Madera v. Madera Canal & Irr. Co.*, 159 Cal. 749, 115 Pac. 926; *South Yuba Water Co. v. City of Auburn*, 16 Cal. App. 775, 118 Pac. 101.)

MORGAN, J.—Appellant instituted this action pursuant to sec. 3310, Rev. Codes, to recover the cost of construction of certain bridges built across irrigation ditches and canals of respondent. That section makes it the duty of the owner of a ditch or canal to build substantial bridges at all places where it crosses county or state roads, or any road kept open and used by the people of a neighborhood for their convenience and benefit, and provides that in case the owner neglects or refuses so to do, the board of county commissioners of the proper county shall, after ten days' notice, proceed to construct the same, and shall collect the cost thereof, together with costs of suit.

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It appears from the amended complaint that on January 12, 1909, the board of county commissioners of Lincoln county, by order entered of record, declared all section lines within certain townships in that county to be public highways; that appellant was organized as a highway district on June 20, 1911, and succeeded to the ownership of the roads laid out and constructed within its territory; thereafter Gooding county was created from a portion of Lincoln county and the townships in question were included therein; that, prior to the creation of the highway district and during the latter part of the year 1909 and early in 1910, respondent constructed ditches and canals across certain section lines within the aforesaid townships, and that between September 1, 1911, and December 1, 1912, after the ditches and canals had been constructed and put to use, appellant, while building and repairing highways along these lines, constructed sixteen bridges, at points where they intersected the ditches and canals, at an aggregate cost of \$1,220; that at least fifteen days prior to building the bridges appellant gave notice to respondent to construct them, but by reason of its refusal to do so appellant was obliged to and did build the bridges at its own cost and expense; that all the land adjacent to the section lines above mentioned, prior to January 12, 1909, the date of the order of the board of county commissioners, was public land of the United States and had been filed upon as "Carey Act" land and was reclaimed and watered by the irrigation system of respondent; that the contract between the state of Idaho and respondent, which provides for the construction of the system and for watering the land, contains the following section:

"Sec. 16. Highways.—Entries of land are understood to be made subject to a right of way without compensation to the entryman for roads upon all section lines and also upon all half section lines which may be designated by the board of county commissioners, as may be provided by law."

Respondent demurred to the amended complaint. The demurrer was sustained and, upon appellant's refusal to further

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plead, judgment of dismissal was entered from which this appeal is prosecuted.

Sec. 2477, Rev. Stats. U. S., provides: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." It is appellant's contention that in view of this act of Congress, which grants a free right of way for roads across the public domain and in view of sec. 16, heretofore quoted, of the contract between the state and respondent reserving the right to lay out highways along the section lines here under consideration, no other action than that taken by the board of county commissioners was necessary to establish legal highways thereon. In support of this contention the following cases are cited for our consideration: *Schwerdtle v. Placer Co.*, 108 Cal. 589, 41 Pac. 448; *Tholl v. Koles*, 65 Kan. 802, 70 Pac. 881; *Wallowa Co. v. Wade*, 43 Or. 253, 72 Pac. 793; *Walbridge v. Board of Commrs. Russell Co.*, 74 Kan. 341, 86 Pac. 473; *Board of County Commrs. of Cowley Co. v. Johnson*, 76 Kan. 65; 90 Pac. 805; *Molyneux v. Grimes*, 78 Kan. 830, 98 Pac. 278; *Mills v. Glasscock*, 26 Okl. 123, 110 Pac. 377; *Wells v. Pennington Co.*, 2 S. D. 1, 39 Am. St. 758, 48 N. W. 305.

These authorities decide that where the state legislature declares certain section lines on the public domain to be highways, such lines are thenceforth highways on the theory that such a declaration is an acceptance of the grant made by the government, where no private rights have theretofore intervened, and that where the statutes of the state have provided for laying out highways by action of the board of county commissioners or where a right of way has been acquired by prescription such action by the board, in the manner provided by law, or user for the prescribed period, is as complete an acceptance of the government grant as if the legislature itself had acted directly.

In order that an act of a board of county commissioners in laying out a highway be valid, whether it be upon the public domain or over private property, the board must conform, substantially, to the law giving it such authority, because the power to establish highways rests, inherently, in the legis-

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lature and not in the board, and the right may be exercised only in such manner as the legislature prescribes. (*Gorman v. Co. Commissioners*, 1 Ida. 553; *Prothero v. County Commrs.*, 22 Ida. 598, 127 Pac. 175.)

Sec. 916 et seq., Rev. Codes, prescribing the methods to be followed by boards of county commissioners in laying out highways, were in force in 1909, at the time of the action of the board which is relied upon by appellant in this case. These sections, at that time and prior to the amendment of the law upon that subject, provided for the filing of a petition by a certain number of residents of the road district in which the proposed highway was to be built; that the petition must describe the route, state the estimated cost and the necessity and advantages of the proposed road. It was necessary that a bond accompany the petition to secure the payment, if it was denied, of the costs of the proceeding; viewers must be appointed whose duty it was to make a report upon the facts alleged in the petition, and a time must be fixed at which those in favor of and those opposed to the establishment of the highway might be heard.

Appellant insists that by section 16 of the contract between the state and respondent all proceedings, such as the petition and hearing, appointment of viewers, etc., were waived and that consent was granted for the establishment of these highways.

Sec. 934, Rev. Codes, was as follows: "Public roads may be established without appointment of viewers, provided the written consent of all the owners of land to be used for that purpose be first filed with the board of county commissioners; and if it is shown to the satisfaction of the county board that the proposed road is of sufficient public importance to be opened and worked by the public, they shall make an order establishing the same, from which time only, shall it be regarded as a public road."

Assuming that respondent could and did give the consent contemplated by that section and that viewers were unnecessary, yet the board must comply with the other provisions of the law. Respondent is not shown by the amended complaint

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to have waived (even though it could have done so) the presentation of a petition signed by the requisite number of residents of the district, notice of hearing, or the trial of the question of the sufficiency of public importance of the highways, and the amended complaint does not show that these steps, necessary to invest the board with jurisdiction, were taken.

The most favorable construction to appellant of which section 16 of the contract is susceptible is that respondent consented, for itself and for future entrymen, not to the laying out of highways, nor that they would be of advantage or importance, but only that if the board of county commissioners, after proper petition and hearing thereon, should decide that highways were necessary and of sufficient public importance to justify the expense of their establishment and maintenance, and should otherwise proceed "*as provided by law*" in designating, establishing and laying them out, no compensation would be exacted for necessary land taken for that purpose along section and half-section lines.

The owner of a ditch or canal constructed across an established highway must provide a bridge, at the point of intersection, for the use and benefit of the public, but if the ditch or canal is constructed prior to the establishment of a public road which intersects it, the expense of building the bridge must be borne by the county or highway district to which the road belongs. (*MacCammelly v. Pioneer Irr. Dist.*, 17 Ida. 415, 105 Pac. 1076; *Boise City v. Boise City Canal Co.*, 19 Ida. 717, 115 Pac. 505; *City of Twin Falls v. Harlan*, 27 Ida. 769, 151 Pac. 1191.)

The amended complaint in this case fails to show that the board of county commissioners complied with the statutes in the matter of laying out and establishing the highways in question, and since it could not, legally, act in an arbitrary manner and without regard to the wishes of those whose property was taxable for the construction and maintenance of the same, it follows that the order relied upon by appellant does not appear from the amended complaint to be valid; that the facts alleged in the amended complaint do not show respond-

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ent to be chargeable with the cost of constructing the bridges, and the demurrer was properly sustained. (*Canyon Co. v. Toole*, 9 Ida. 561, 75 Pac. 609.)

The judgment appealed from is affirmed. Costs are awarded to respondent.

Rice, J., concurs.

BUDGE, C. J., Concurring in Part and Dissenting in Part. With respect to that portion of the opinion which holds that: "If the ditch or canal is constructed prior to the establishment of a public highway which intersects it, the expense of building the bridge must be borne by the county or highway district to which the road belongs," I concur. But it should be noted that the previous decisions of this court (*MacCammelley v. Pioneer Irr. Dist.*, 17 Ida. 415, 105 Pac. 1076; *City of Twin Falls v. Harlan*, 27 Ida. 769, 151 Pac. 1191) make the question of the duty or the lack of duty on the part of those constructing canals to bridge them, turn upon the question of whether or not the roads were in actual use or were actually constructed at the time the canals were built. Applying that test to this case the demurrer should be sustained.

I am unable to concur, however, in that portion of the opinion which holds that the board of county commissioners of Lincoln county exceeded its authority in the order of January 12, 1909, declaring all section lines public highways. Sec. 2477, Rev. Stats. U. S. (U. S. Comp. Stats. 1916, sec. 4919, 6 Fed. Stats. Ann., p. 498), grants a right of way for highways over public land. The Carey Act granted certain of the public lands of the United States to the state of Idaho. The legislature accepted the conditions of the Carey Act, sec. 1613, Rev. Codes. Sec. 3 of the Carey Act provides:

"Any state contracting under this section is hereby authorized to make all necessary contracts to cause the said land to be reclaimed."

By sec. 1613, Rev. Codes, the selection, management and disposal of said lands is given to the state board of land com-

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missioners. Sec. 16 of the contract between the state of Idaho and the respondent company, which is binding not only on said company, but upon all settlers taking up land thereunder, provides:

“Entries of land are understood to be made subject to a right of way without compensation to the entryman for roads upon all section lines and also upon half section lines which may be designated by the board of county commissioners, as may be provided by law.”

This would seem to be a sufficient acceptance of the grant on the part of the state, and defines the location upon which roads may be designated. The board of county commissioners of the county in question entered an order declaring all section lines in question to be public highways.

In my opinion the provisions of the Rev. Codes, sec. 916 et seq., were evidently intended to restrict, limit and define the mode of exercising the right of eminent domain, that is, the right of the county to take private property for a public use. Sec. 934, Rev. Codes, provides:

“Public roads may be established without the appointment of viewers, provided the written consent of all the owners of the land to be used for that purpose be first filed with the board of county commissioners; and if it is shown to the satisfaction of the county board that the proposed road is of sufficient public importance to be opened and worked by the public, they shall make an order establishing the same, from which time only, shall it be regarded as a public road.”

If I understand respondent's contention correctly, it is that notwithstanding all of the land in question was taken with the right of way on section and half-section lines, reserved, and, therefore, the consent of the owners would not be necessary, that the consent in some manner ought to be filed with the board. It will be noticed, however, that the written consent which is to be filed with the board is, “of all the owners of the land to be used for that purpose.” Here the owners of the land in question owned it subject to the easement, for the government had granted a right of way over the land and the state had expressly reserved the rights of way in question

Points Decided.

so that there are no owners within the meaning of this section who need be consulted. It is a fundamental principle of law that no one is required, much less a public officer or public board, to do a vain and useless thing, and to require the filing of a written consent where no written consent is necessary and where there is no one to either consent or dissent, would avail nothing.

The question of whether or not it is shown to the satisfaction of the county board that the proposed road is of sufficient public importance is a question addressed solely to the sound discretion of the board, and the fact that the board made an order which is duly and regularly entered of record, designating certain roads, would be an acceptance of the grant, and would carry with it the presumption that the board was satisfied that the roads were of sufficient importance and necessary.

I am of the opinion that the proceedings of the board were perfectly regular and constituted a valid acceptance of the grant, but even if they were not, I think the board had ample authority to enter the order. (*Streeter v. Stalnaker*, 61 Neb. 205, 85 N. W. 47.)

(March 24, 1917.)

BEN. Q. PETTENGILL, as Special Deputy Bank Commissioner of the State of Idaho and as Receiver in the Matter of Winding Up the Affairs of the **BOISE STATE BANK, LIMITED**, an Insolvent Bank and Trust Company, Appellant, v. **WILLIAM H. BLACKMAN** and **HERBERT F. LEMP**, **EDWARD PAYNE**, as Trustee, and **EDWARD PAYNE**, Respondents.

[164 Pac. 358.]

ACTION TO QUIET TITLE—ADVERSE INTERESTS—ADMISSION OF GENUINENESS OF INSTRUMENT NOT ADMISSION OF VALIDITY—TRANSFER BY INSOLVENT CORPORATION—CONSIDERATION—UNLAWFUL MEETING OF BOARD OF DIRECTORS—UNAUTHORIZED ACTS OF CORPORATION OFFICERS—RATIFICATION—ESTOPPEL.

1. *Held*, that in this case an action to quiet title is a proper form of action to attain the end desired, as shown by the pleadings.

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Points Decided.

2. In a suit to quiet title the plaintiff has a right to have every adverse interest determined, and anyone claiming to hold any interest in the property in question, which would be adverse to plaintiff's interest, may be required to come in and set up the nature of his interest and its source. The interest of a mortgagee is an interest adverse to the holder of a legal title.

3. Where plaintiff has waived his right to introduce evidence attacking the due execution or genuineness of a written instrument pleaded and set forth in defendant's answer, by failing to file an affidavit denying the same, as required by sec. 4201, Rev. Codes, such omission does not place him in the position of admitting the validity of such instrument, but he may interpose any evidence on the trial tending to show that such instrument, irrespective of its due execution and genuineness, is void, invalid and of no effect for the purpose offered.

4. In the absence of collusion or fraud, an insolvent corporation is not prohibited from preferring certain creditors over others.

5. Where an insolvent corporation makes a *bona fide* transfer of property to a creditor as security for an actual indebtedness and for an adequate consideration, neither collusion nor fraud in its legal sense can be predicated on such transaction.

6. Where a meeting of the board of directors of a private corporation was not lawful, for the reason that notice was not given to all of the directors as required by the by-laws, the failure of absent directors or the stockholders to dissent or take any action to set aside the action of the board of directors, under such circumstances, with knowledge of such action, amounts to a ratification thereof.

7. Where a private corporation receives and retains the benefits of an unauthorized or illegal transaction, on the part of its board of directors, such conduct amounts to a ratification.

8. The extension of time by a creditor within which to pay an old obligation is as much a consideration and as much an extension of credit as the granting of a new loan.

9. Where one without collusion or fraud deals with a corporation through an officer, who is in active management of the corporate business, if the act done by such officer is one which the corporation might do, such corporation will be estopped from relying upon any lack of authority on the part of such officer as a defense against the rights of the party so dealing with the corporation.

10. Where a party deals with a corporation in good faith and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing

Argument for Appellant.

to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists.

[As to clouds on title and who may maintain suits to remove them, see note in 45 Am. St. 373.]

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Charles P. McCarthy, Judge.

Action to quiet title to certain real property, brought under sec. 4538, Rev. Codes. From a judgment for defendant, plaintiff appeals. *Affirmed.*

Martin & Cameron, for Appellant.

The giving of the trustee deed and mortgage by the Boise State Bank was unauthorized. The board of directors of the bank did not meet pursuant to law at the time the mortgage and trustee deed were acted upon. (2 Thompson on Corporations, secs. 1139, 1140; *Doernbecher v. Columbia City Lumber Co.*, 21 Or. 573, 28 Am. St. 766, 28 Pac. 899; *Curtin v. Salmon River etc. Co.*, 130 Cal. 345, 80 Am. St. 132, 62 Pac. 552; *Singer v. Salt Lake City C. Mfg. Co.*, 17 Utah, 143, 70 Am. St. 773, 53 Pac. 1024; *Harding v. Vandewater*, 40 Cal. 77; *Farwell v. Houghton Copper Works*, 8 Fed. 66; *Bank of Little Rock v. McCarthy*, 55 Ark. 473, 29 Am. St. 60, 18 S. W. 759; *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99; *Hatch v. Lucky Bill Mining Co.*, 25 Utah, 405, 71 Pac. 865; *Simon v. Sevier Assn.*, 54 Ark. 58, 14 S. W. 1101; *Whitehead v. Hamilton Rubber Co.*, 52 N. J. Eq. 78, 27 Atl. 897; *Paola etc. Ry. Co. v. Anderson, County Commrs.*, 16 Kan. 302.)

In the giving of the contemplated deed to Blackman, Payne was to act as a trustee, with limited powers, according to the minutes of the directors' meeting. He was to be trustee appointed by the bank for this particular purpose, and any act done by Payne, without the scope of this trusteeship there given him, was invalid and void, and cannot bind this plaintiff. (*Owen v. Reed*, 27 Ark. 122; *Zion Church v. Parker*, 114 Iowa, 1, 86 N. W. 60; *Smith v. Burgess*, 133 Mass. 511; *Perry on Trusts and Trustees*, sec. 475.)

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A contract not within the scope of the authority of the officer who made it could not be ratified by the board of directors unless they had full and complete knowledge of the terms and conditions of the contracts proposed to be ratified. (2 Thompson on Corporations, 2d ed., sec. 2030, and cases cited; *Conqueror Gold Min. etc. Co. v. Ashton*, 39 Colo. 133, 90 Pac. 1124.)

The plaintiff by failing to file an affidavit denying the genuineness and due execution of this note and mortgage did not thereby admit that said note and mortgage were the note and mortgage of the Boise State Bank, and thereby preclude himself from showing that said note and mortgage were not authorized by the board of directors. (*Myers v. Sierra Valley etc. Assn.*, 122 Cal. 669, 55 Pac. 689; 3 Thompson on Corp., 2d ed., p. 1225; *Heath v. Lent*, 1 Cal. 410, 411; *Marx v. Raley & Co.*, 6 Cal. App. 479, 92 Pac. 519.)

The case of *Cox v. Northwestern Stage Co.*, 1 Ida. 376, curtails the effect of a failure to file an affidavit denying the genuineness and due execution, and points out that any other defense may be interposed except what is strictly included within genuineness and due execution.

The officers of a corporation can only execute a deed in its name pursuant to resolution of the board of directors. (*Warren v. Stoddart*, 6 Ida. 692, 59 Pac. 540; *Johnson v. Sage*, 4 Ida. 758, 44 Pac. 641; *Bliss v. Kaweah Const. & Irr. Co.*, 65 Cal. 502, 4 Pac. 507.)

It is the execution only that is admitted by an affidavit and not the right or authority of the party making it. (*Hils-meyer v. Blake*, 34 Okl. 477, 125 Pac. 1129; *Flesher v. Callahan*, 32 Okl. 283, 122 Pac. 489.)

Acts done by an agent or trustee outside the strict scope of his authority are absolutely void. (*United States Nat. Bank v. Herron*, 73 Or. 391, 144 Pac. 661, L. R. A. 1916C, 125; 1 Clark & Skyles on the Law of Agency, par. 266; 1 Mechem on Agency, secs. 784, 974; *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150; *Batty v. Carswell*, 2 Johns. (N. Y.) 48, 49; *Mechanics' Bank v. Schaumburg*, 38 Mo. 228; *Harris v. John-*

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ston, 54 Minn. 177, 40 Am. St. 312, 55 N. W. 970; 31 Cyc. 1383.)

Wyman & Wyman, for Respondents.

Where an officer of a corporation without authority undertakes to perform a corporate act, the other officers or directors must immediately on discovery repudiate the transaction and return the benefits or the corporation will be bound. (Thompson on Corporations, 2d ed., secs. 2019, 2020, 2044; *Currie v. Bowman*, 25 Or. 364, 35 Pac. 848.)

Where the bank retains the benefit of the contract, it is estopped to deny its validity. (*Bartlett Estate Co. v. Fraser*, 11 Cal. App. 373, 105 Pac. 130; *Ida County Sav. Bank v. Johnson*, 156 Iowa, 234, 136 N. W. 225; *German Nat. Bank v. Grinstead*, 21 Ky. Law Rep. 674, 52 S. W. 951; *First Nat. Bank v. Kimberlands*, 16 W. Va. 555; *Akers v. Ray County Savings Bank*, 63 Mo. App. 316; *Goldbeck v. Kensington Nat. Bank*, 147 Pa. St. 267, 23 Atl. 565; *Bank of New London v. Ketchum*, 64 Wis. 7, 24 N. W. 468; Thompson on Corporations, 2d ed., secs. 1960, 1964.)

No affidavit was filed by the plaintiff, and consequently the genuineness and due execution of the contract was deemed admitted by the plaintiff. (*Cox v. Northwestern Stage Co.*, 1 Ida. 376; *Martin v. Dowd*, 8 Ida. 453, 69 Pac. 276; *Sloan v. Diggins*, 49 Cal. 38; *Carpenter v. Shinnors*, 108 Cal. 359, 41 Pac. 473; *Rianda v. Watsonville Water & Light Co.*, 152 Cal. 523, 93 Pac. 79; *Petersen v. Taylor*, 4 Cal. Unrep. 335, 34 Pac. 724; *Cordano v. Wright*, 159 Cal. 610, Ann. Cas. 1912C, 1044, 115 Pac. 227; *Knight v. Whitmore*, 125 Cal. 198, 57 Pac. 891; *Reynolds v. Pennsylvania Oil Co.*, 150 Cal. 629, 635, 89 Pac. 610.)

There was no legal objection to the bank's giving the security, even though Blackman had known that the bank was in failing circumstances at the time. (*Wilson v. Baker Clothing Co.*, 25 Ida. 378, 137 Pac. 896, 50 L. R. A., N. S., 239; *Capital Lumber Co. v. Saunders*, 26 Ida. 408, 143 Pac. 1178.)

Opinion of the Court—Budge, C. J.

BUDGE, C. J.—This is an action brought by Ben. Q. Pettengill, as receiver of the Boise State Bank, Limited, against William H. Blackman, Edward Payne as trustee, and Edward Payne, for the purpose of quieting title to lots Nos. 1, 2, 3, 4 and 5 of block No. 13, Riverside Addition to Boise City, Ada county. Herbert F. Lemp was also made a defendant, but plaintiffs dismissed as to him.

The case comes before us on appeal by the plaintiff from an adverse judgment entered by the district court of the third judicial district, in and for Ada county where the suit was brought. The complaint is in the usual form, setting out the manner in which plaintiff came to be receiver of the bank; fee-simple title to the property in question in the bank; and, "That the defendants claim an interest or estate in said premises adverse to the Boise State Bank, Limited, and to this plaintiff in his capacity as set forth in the title of this cause.

"That the claims of said defendants are without any right whatever, and that the said defendants have not any estate, right, title, or interest whatever in said land or premises or any part thereof."

The complaint contains a prayer that the defendants be required to set forth the nature of their claim; that all adverse claims of the defendants be determined by the decree of the court; that it be decreed that the defendants have no estate or interest whatever in or to said land or premises, and that the title of the bank is good and valid; that the respondents be enjoined and debarred from asserting any claim whatever in or to said land and premises adverse to the appellant or to the bank; and for such other relief as the court shall deem proper.

The answer denies that the bank is an owner in fee or otherwise of the lands in question, and denies "that the claims of these respondents are without any right whatever, and deny that these respondents have no estate, right, title or interest in said lands." And as an affirmative defense alleges that the respondent, Blackman, was the holder of a certificate of deposit of said bank, dated, Boise, Idaho, Nov. 10, 1910, due

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six months after date; that the certificate had not been paid; that on or about the 3d day of November, 1911, Blackman informed the bank that he desired to cash the certificate; that the bank agreed with Blackman that in consideration of his not insisting upon immediate payment and of his extending the time until May 10, 1912, such certificate should bear interest at the rate of eight per cent per annum from and after Nov. 3, 1911; that the bank would cause said debt to be secured by a mortgage upon the lands in question; that pursuant to the agreement Blackman did not insist upon the payment of the certificate but did extend the time to May 10, 1912; that the bank made the following indorsement upon said certificate: "In consideration of security and extension of time of payment hereof until May 10, 1912, this certificate is to bear interest at the rate of eight per cent per annum from Nov. 3, 1911"; that Blackman performed all the conditions of said agreement upon his part to be performed; that in pursuance of the agreement, the bank, on or about Nov. 3, 1911, executed and delivered to defendant, Edward Payne as trustee, a deed conveying the property in question to said Payne in trust, "with the express understanding and upon the express condition that said Payne, as such trustee, would thereupon and immediately after receiving said deed, execute and deliver to said Blackman, his certain promissory note for \$14,144.14, dated November 3, 1911, due on or before six months after the date thereof, bearing interest at the rate of eight per centum per annum. Which said note was to evidence the same debt, also evidenced by the certificate of deposit; and also that the said respondent, Payne, as such trustee, would immediately secure the payment of said note by mortgaging" the property in question; that on or about Nov. 3, 1911, the respondent, Payne, as said trustee, pursuant to said agreement executed and delivered to respondent, Blackman, his promissory note for \$14,144.14, and at the same time executed and delivered to Blackman a mortgage upon the property in question; that Payne, as trustee, duly performed all the terms and conditions of said agreement on his part to be performed; that neither the note nor the debt evidenced thereby

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has been paid; that Blackman is the holder and owner of the certificate of deposit and the note and the debt evidenced thereby, as well as the mortgage; that the respondent, Payne, claims no interest in the property except as trustee for the purpose set forth; and that respondent, Blackman, claims no interest except the lien of his mortgage.

Copies of the deed from the bank to Payne as trustee, of the note from Payne as trustee to Blackman, and of the mortgage from Payne as trustee to Blackman are attached to the answer as exhibits and included in the pleadings set forth in the answer by proper references.

The plaintiff did not file any affidavit denying the genuineness or due execution of either the deed, note or mortgage.

The record discloses the following facts: On October 25, 1911, the bank was insolvent; on the 25th, 26th and 27th of October, 1911, V. W. Platt, then bank commissioner of the state of Idaho, conducted an examination of the bank and told the officers of the bank, including Payne, who was then president, that the bank "was broke wide open." At that time Blackman was the holder of the certificate of deposit mentioned in the pleadings, which had been due since the previous May. It appears that Blackman had kept, for a time long prior to this examination of the bank, a large sum of money on deposit with the bank and had held the bank's certificate of deposit therefor; that these certificates had come due from time to time and had been renewed, each new certificate apparently including, not only the principal of the previous certificate, but also the accrued interest. Several of these renewals had taken place, the last one being the certificate of deposit which was outstanding at the time the bank was examined in October, 1911. After Payne had been advised by the bank commissioner that the bank "was broke wide open," he and his son, Eugene, the cashier of the bank, made a trip in the night-time in an automobile to Mountain Home, Idaho, to see Blackman, and being unable to see him left word for Blackman to come to Boise, that Payne wished to see him; Blackman came to Boise a day or so afterward and went to see Payne at his home, between 8 and 9 o'clock one morning,

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and said that he wanted his money, and Payne told Blackman that it would cripple the bank, and asked him if it would be satisfactory if the bank would give him security. On Nov. 3, 1911, the directors of the bank held a special meeting, at which all of the directors except one Pence, who had not been notified, were present; and a resolution was adopted that Payne be made trustee of the property in question, to execute a deed to Blackman to secure his certificate of deposit.

On the same day the bank deeded the property to Payne, trustee, and Payne, as trustee, gave the note and mortgage in question to Blackman.

In order to discuss the points involved in this case it will be necessary at the outset to give some consideration to the pleadings. Respondent says in his brief:

“It might seem from appellant’s brief that this action was brought by the receiver, Pettengill, to remove a definite cloud upon the title to certain realty claimed by the receiver. Such, however, is not the case. The action is the familiar one brought under the statute to quiet title.”

Respondent is evidently proceeding upon the theory that the plaintiff, in order to secure the relief he is seeking, should have so drafted his complaint that it would have set forth the existence of the deed, note and mortgage in question; the reasons why they should be held void, and included in his prayer, a specific prayer that the instruments in question be canceled of record; and that inasmuch as appellant has not so drafted his complaint, he should not be granted the relief he is demanding. Conceding that such would have been a proper way to proceed, still we are satisfied that the method selected by appellant is also a proper one and, so far as the pleadings are concerned, adequate for the desired end. Suppose that the defendant had defaulted in this case and that plaintiff had gone ahead and secured a decree, not only quieting the title in him or in the bank, but also decreeing the further relief expressly prayed for, namely, that the defendant had no estate, right, title or interest in or to the property in question. It will not be seriously contended but that in that event defendant’s interest would have been effectively eliminated. In

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order for the defendant to protect whatever rights he had in the property, it was necessary for him to appear in the action and pursue the identical course which the record shows he did pursue, namely, to set up affirmatively by way of defense the grounds upon which his interest, if any, was based. Except in so far as the affidavit under sec. 4201, Rev. Codes, may be considered a pleading, there is no provision under the code by which plaintiff was either required or permitted, to set up any affirmative matter by way of replication to the defendant's answer, but under sec. 4217, Rev. Codes, the plaintiff would be permitted to interpose any evidence which would tend to establish the matter relied upon affirmatively by the plaintiff, such as the failure of the instrument for want of consideration, or fraud, or other matters in avoidance thereof; except that in the particular case, having failed to file his affidavit, he could not interpose evidence attacking either the due execution or the genuineness of the instruments attached to defendant's answer.

It should be noted here that there is a distinction between the situation of a defendant who fails to plead matters relied upon as an affirmative defense on the one hand, and the situation of a plaintiff under the code, which has abolished the replication, when it comes to attacking affirmative matter, pleaded as new matter in the answer. In order for a defendant to take advantage of an affirmative defense, he must specifically allege it or his proof will not be admitted. (*Puritan Mfg. Co. v. Toti & Gradi*, 14 N. M. 425, 94 Pac. 1022.) But the plaintiff may take advantage of any affirmative matter which would tend to avoid the affirmative matter set forth in defendant's answer as fully as if he were permitted to specifically plead his matter defensive thereto. (*Cox v. Northwestern Stage Co.*, 1 Ida. 376; *Curtiss v. Sprague*, 49 Cal. 301; *Colton Land & W. Co. v. Raynor*, 57 Cal. 588; *Brooks v. Johnson*, 122 Cal. 569, 55 Pac. 423; *Myers v. Sierra Valley etc. Assn.*, 122 Cal. 669, 55 Pac. 689; *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630; *Bradley v. Bush*, 11 Cal. App. 287, 104 Pac. 845.)

A bill to cancel an instrument which casts a cloud upon plaintiff's title may well be included in the statutory suit to

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quiet title; a suit to quiet title is the larger and the inclusive term. Whereas a bill to cancel an instrument is only one specific instance of an equitable action for the removal of a cloud. (1 Bouvier Law Dict., Rawle's 3d ed., 364, and cases cited therein; 3 Daniel's Chancery Pleading and Practice, 6th Am. ed., p. 2040; *Carpenter v. Shinnors*, 108 Cal. 359, 41 Pac. 473.)

In a suit to quiet title the plaintiff has a right to have determined every adverse interest, and anyone claiming to hold any interest in the property which would be adverse to plaintiff's interest may be required to come in and set up the nature of his interest and its source. It must be conceded that the interest of a mortgagee is an interest adverse to the holder of a legal title. The mortgagee is the holder of an equitable title and interest, and has a definite lien upon the mortgaged premises, and in the event of the failure or inability of the mortgagor, for any reason, to pay the debt secured by the mortgage, he would be subjected to a foreclosure suit, and his property would be subject to forced sale, and if sold, he would have nothing left except the right for a limited period to redeem. Certainly an interest which may be attended with consequences of such moment and which may operate to entirely defeat every interest of the holder of the legal title must be denominated an adverse interest. We are compelled to conclude, therefore, that the course pursued by appellant in this case is at least a proper one.

The defendant contends that, inasmuch as the plaintiff failed to file an affidavit denying the genuineness and due execution of the deed, note and mortgage, attached to defendant's amended answer, plaintiff had thereby admitted the "validity" of said instruments, or at least had waived any right to question their validity. This contention is based upon sec. 4201, Rev. Codes, which reads as follows:

"When the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff file with the clerk, within ten days after receiving a copy of the

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answer, an affidavit denying the same, and serve a copy thereof on the defendant.”

The respondent in support of this view relies upon the following authorities: *Cox v. Northwestern Stage Co.*, *supra*; *Martin v. Dowd*, 8 Ida. 453-456, 69 Pac. 276; *Sloan v. Diggins*, 49 Cal. 39; *Carpenter v. Shinnors*, *supra*; *Rianda v. Watsonville Water etc. Co.*, 162 Cal. 523, 93 Pac. 79; *Petersen v. Taylor*, 4 Cal. Unrep. 335, 34 Pac. 724; *Cordano v. Wright*, 159 Cal. 610, Ann. Cas. 1912C, 1044, 115 Pac. 227; *Knight v. Whitmore*, 125 Cal. 198, 57 Pac. 891; *Moore v. Copp*, *supra*; *Reynolds v. Pennsylvania Oil Co.*, 150 Cal. 629, 89 Pac. 610; *Myers v. Sierra Valley etc. Assn.*, *supra*. Without going into a discussion of these authorities, suffice it to say that they generally hold; that in the event of failure to file an affidavit denying the genuineness or due execution of instruments pleaded in this manner, the party so failing to file said affidavit is precluded from introducing evidence attacking either the genuineness or the due execution of said instruments.

On the other hand, appellant contends, and we think, correctly, that, notwithstanding he has waived his right to introduce evidence attacking the due execution or the genuineness of the instruments, this does not put him in the unfortunate position of admitting the “validity” of the instruments, and takes the position that he should be allowed to interpose any evidence tending to show that the instruments, notwithstanding their due execution and genuineness, are void, invalid and of no effect, as to the depositors of the bank.

As above indicated, we are persuaded from our examination of the authorities that this position of appellant’s is the correct one. All of the cases cited by respondent can be reconciled to this view, whereas the cases cited by appellant, particularly *Myers v. Sierra Valley etc. Assn.*, *supra*, *Cox v. Northwestern Stage Co.*, *supra*, *Moore v. Copp*, *supra*, are tenable under no other theory. In *Cox v. Northwestern Stage Co.*, *supra*, this court held that a failure by plaintiff to deny, by affidavit, the genuineness and due execution of an instrument in writing set forth in the answer as the foundation of the defense does not preclude the plaintiff from showing on the

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trial that it was procured by fraud or misrepresentation. This question is closely allied with the question raised in the discussion in the pleadings, *supra*.

In *Curtiss v. Sprague, supra*, it was held that where a defendant set up a counterclaim, which was barred by the statute of limitations, plaintiff would be considered to have pleaded the statute by way of replication.

In *Colton Land & Water Co. v. Raynor, supra*, it was held that a plaintiff may introduce upon the trial evidence of any fact which contravenes or overthrows any new matter set up in the answer to the complaint.

In *Brooks v. Johnson, supra*, it was held that the failure of the plaintiff, in an action to foreclose a mortgage, to file an affidavit denying the genuineness and due execution thereof did not preclude proof by the plaintiff, on the finding by the court that the extension of time was without consideration.

In *Myers v. Sierra Valley etc. Assn., supra*, it was held that while failure to file an affidavit precluded plaintiff from interposing evidence contravening the genuineness and due execution of the note, that with this exception plaintiff could show any matters in confession or avoidance thereof.

The trial court in this case seems to have borne this distinction in mind when making the so-called "sticker ruling," in excluding portions of plaintiff's evidence, which was admitted at the trial with the understanding that the ruling thereon would be reversed; the trial court said:

"Upon final submission of the case the objection to the evidence offered is sustained in so far as the same attacks the genuineness or due execution of the written instrument upon which the defense to the action is founded, for the reason that the plaintiff did not file with the clerk of this court within ten days after receiving a copy of the answer, an affidavit denying the genuineness or due execution of said instrument, and serve a copy thereof on the defendant in accordance with the provisions of Idaho Revised Codes, section 4201; the objection as to the identification of said evidence is overruled and said evidence is admitted in so far as it is relevant or material to any other issue in the case."

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The case of *Cox v. Northwestern Stage Co.*, *supra*, appears to be one of the leading cases upon the question of what is meant by genuineness and due execution. The court in that case used the following language:

“The due execution of an instrument goes to the manner and form of its execution according to the laws and customs of the country, by a person competent to execute it. The genuineness of an instrument evidently goes to the question of its having been the act of the party just as represented, or, in other words, that the signature is not spurious; and that nothing has been added to it, or taken away from it, which would lay the party changing the instrument, or signing the name of the person, liable for forgery.”

Respondent appears to be laboring under the erroneous impression that the by-laws and the minutes of the directors' meeting are not in evidence, and, therefore, ought not to be considered by this court. That the contrary is true clearly appears from the ruling of the trial court above quoted, where the court says: “. . . Said evidence is admitted in so far as it is relevant or material to any other issue in the case.”

Appellant seems to lay great stress upon the fact that the bank was insolvent at the time the mortgage was given to Blackman; he does not contend, however, that the bank would not have authority to prefer a creditor even while insolvent. And indeed it must be regarded as settled law in this state that in the absence of collusion or fraud, an insolvent corporation is not prohibited from preferring certain creditors over others. This principle was announced in the case of *Wilson v. Baker Clothing Co.*, 25 Ida. 378, 137 Pac. 896, 50 L. R. A., N. S., 239. And the rule there laid down by this court was followed in the case of *Capital Lumber Co. v. Saunders*, 26 Ida. 408, 143 Pac. 1178. The insolvency of the bank, therefore, would only be material in the event that appellant were able to show either collusion or fraud. But the trial court found that Blackman had no knowledge of the insolvency of the bank at the time of taking the mortgage, and this finding is supported by the evidence. The trial court further found, and it is not questioned by appellant, that the bank

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was indebted to Blackman substantially in the amount for which the security was given. And we think the rule to be, that wherever there is a true debt and a real transfer for an adequate consideration, there is no collusion, and that fraud in its legal sense cannot be predicated on such a transaction. (Bump, *Fraud. Conv.*, 2d ed., p. 187; *Currie v. Bowman*, 25 Or. 364, 35 Pac. 848-852.)

Appellant seeks further to attack the validity of this mortgage on the ground that the meeting of the board of directors, at which it was authorized, was not a lawful meeting, for the reason that notice was not given to all of the directors as required by the by-laws of the bank; and takes the position that any action of the board of directors under such circumstances would be void, and hence not binding upon the bank.

Respondent, however, contends that the action of the board of directors was ratified by the failure of the absent director to take any action by way of dissent after he was advised by Payne that the security had been given. He further contends that the bank received certain benefits from the transaction which it has not returned; that the bank has acquiesced in the giving of the security; that there was an agreement by the president to give the security upon the consideration that Blackman would extend the time of payment on the certificate of deposit; and that the bank is estopped from attacking the validity of the mortgage.

As to the question of ratification, the trial court found in substance that the action of the board of directors was ratified. The authorities upon the question of ratification are not altogether harmonious, and it would be a task altogether beyond the scope of this opinion to attempt to reconcile them. There is abundant authority, however, to the effect that under similar circumstances, the failure to dissent or to take any action looking toward the setting aside of the action of the board of directors under such circumstances, where knowledge of it has been at hand, amounts to a ratification of the action in question. (Cook on Corporations, 7th ed., secs. 808 and 809, and cases cited; Thompson on Corporations, 2d ed., secs. 2019-2044, and cases cited; *Central Trust Co. v. Ashville Land Co.*, 72 Fed. 361, 18 C. C. A. 590.)

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We shall not attempt to discuss all the authorities so holding, but will refer to a few. Receiving and retaining the benefits of the transaction, although unauthorized or irregular, will amount to a ratification. (See the authorities cited *supra*; *Bank of New London v. Ketchum*, 64 Wis. 7, 24 N. W. 468; *Goldbeck v. Kensington Nat. Bank*, 147 Pa. St. 267, 23 Atl. 565; *Ida County Savings Bank v. Johnson*, 156 Iowa, 234, 136 N. W. 225; *Currie v. Bowman*, *supra*; *Vaught v. Ohio County Fair Co.*, 20 Ky. Law Rep. 1471, 49 S. W. 426; *Kelsey v. National Bank of Crawford County*, 69 Pa. St. 426; *Hooker v. Eagle Bank*, 30 N. Y. 83, 86 Am. Dec. 351; *Sherman v. Fitch*, 98 Mass. 59; *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315; *Manhattan Hardware Co. v. Phalen*, 128 Pa. St. 110, 18 Atl. 428; *Manhattan Hardware Co. v. Roland*, 128 Pa. St. 119, 18 Atl. 429; *Nevada Nickel Syndicate v. National Nickel Co.*, 96 Fed. 133.)

But appellant contends that the bank received no benefits, and that the mortgage to Blackman is in reality without any consideration. Under the facts in this case, however, such contention seems unwarranted in law. The extension of time within which to pay the old obligation is as much a consideration and as much an extension of credit as the granting of a new loan. In the case of *Auten v. City Electric St. R. Co.*, 104 Fed. 395, the court expressly so held.

In the last case cited the property was conveyed by an absolute deed to a grantee, who is designated in the deed as a "trustee"; the conveyance was in fact made to secure an indebtedness due a third party and such fact was admitted. The court held that the debtor could not invoke the statute of frauds to invalidate the deed or to defeat the trust thereby created on the ground that the deed failed to disclose the object of the trust or the beneficiary, but that the power, nature and purpose of the transaction could be shown by the creditor by parol, particularly in the absence of any objection by the grantee who held the legal title. In the same case it was also held that the fact that no formal action was taken by the directors of the company authorizing the conveyance would not defeat the equitable right to enforce the security, the company having received the entire benefit

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thereof. The questions of ratification, receiving and retaining benefits and estoppel are closely related, and the decisions have not always made it plain as to just which ground is decisive in any particular case.

It seems to be the well-recognized rule that where one without collusion or fraud deals with a corporation through an officer who is in the active management of the business, if the act done by said officer of the corporation is one which the corporation might do, the corporation will be estopped from relying upon any lack of authority in said officer as a defense against the rights of the party so dealing with the corporation. (*Sherman v. Fitch, supra*; *Indianapolis Rolling Mill Co. v. St. Louis etc. R. Co.*, 120 U. S. 256, 7 Sup. Ct. 542, 30 L. ed. 639; *First Nat. Bank of Wellsburg v. Kimberlands*, 16 W. Va. 555; *Gribble v. Columbus Brewing Co.*, 100 Cal. 67, 34 Pac. 527; *Akers v. Ray County Savings Bank*, 63 Mo. App. 316; *German Nat. Bank v. Grinstead*, 21 Ky. Law Rep. 674, 52 S. W. 951; *Bartlett Estate Co. v. Fraser*, 11 Cal. App. 373, 105 Pac. 130.) In the latter case it was held that the president of a bank, being its executive head under the usages and customs of modern banking, the rule that his power is limited to transactions expressly authorized by the directors no longer obtains.

In 3 Cook on Corporations, 7th ed., sec. 716, the rule is laid down as follows: "So also a company is bound when it ratifies or accepts a contract after it is made, or accepts the benefits of the contract. Having knowingly received the benefits of a contract made and carried out by the president, even without authority, the corporation must perform on its part."

And many cases are cited approving the doctrine. One of the cases there cited sums up the rule, saying of the board: "They may previously resolve; they may subsequently acquiesce; they may expressly ratify; they may intentionally receive and appropriate the proceeds of the unauthorized transaction and so put it out of their power to dispute its validity." (*Curtis v. Leavitt*, 15 N. Y. 9-49.)

The rule is further announced by the same author, sec. 725, p. 2569: "A mortgagee is not bound to inquire into the ob-

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servance of the rules and regulations of the company relative to the call of meetings.”

This principle of law was applied in *Louisville N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. ed. 1081. The opinion quotes as authority from the case of *Merchants' Bank v. State Bank*, 10 Wall. (77 U. S.) 604, 19 L. ed. 1008, the following proposition, which is designated as an axiomatic principle in the law of corporations:

“Where a party deals with a corporation in good faith . . . and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them.”

The court, after reviewing a number of the leading English and American authorities, further said, that the records of the board of directors were private records, “which a purchaser of the bonds was not obliged to inspect as he would have been if the fact had been required by law to be entered upon a public record.”

The trial court found that the legal title of the property in question was in the bank. This is clearly wrong, but is probably an oversight, inasmuch as the point does not seem to have been regarded as material by either appellant or respondent. It must be conceded, however, that the legal title to this property is in Payne, as trustee.

If for any reason the circumstances require the appointment of a new trustee, the trial court has ample jurisdiction to give it effect.

The case is remanded to the district court, with instructions to modify its findings and decree in accordance with the views herein expressed. Costs awarded to respondent.

MORGAN, J., Concurring.—I concur in the conclusion reached that the judgment of the trial court should be affirmed, and base my concurrence upon the failure of appellant to deny,

Points Decided.

as required by sec. 4201, Rev. Codes, the genuineness and due execution of the deed, upon which the defense was founded and which was annexed to and made a part of the answer.

RICE, J., Concurring.—I concur in the opinion of Mr. Justice Morgan that the failure of the plaintiff to deny the genuineness and due execution of the deed and mortgage in question is an admission of the authority for their execution, and precludes appellant from urging the illegality of the meeting of the board of directors or limitations upon the authority of Payne as trustee.

I concur in the opinion of Chief Justice Budge that even if the authority for the execution of the deed and mortgage were lacking in the first instance, the plaintiff is estopped from questioning the authority, for the reason that it cannot be held that respondent Blackman did not forego substantial rights by the acceptance of the note and mortgage.

(March 27, 1917.)

STATE, Respondent, v. E. D. ROGERS, Appellant.

[163 Pac. 912.]

CRIMINAL LAW—INFORMATION—ADMISSION OF IMMATERIAL AND PREJUDICIAL TESTIMONY—ADMISSIBILITY OF THREATS—PREJUDICIAL ERROR—INSTRUCTIONS.

1. *Held*, that the language of the information in this case is sufficient to charge the crime of which the defendant was convicted in the court below.

2. Where upon a criminal trial counsel for defendant objects to certain testimony offered on behalf of the state, with regard to the

On the question of applicability of rule of reasonable doubt to self-defense in homicide, see notes in 19 L. R. A., N. S., 483; 31 L. R. A., N. S., 1166.

On evidence in a criminal case of threats of accused or of person injured or killed, see note in 17 L. R. A. 654.

Points Decided.

use of vile language, and counsel for the state promises to thereafter connect such testimony with the defendant, but fails to do so, and there is no evidence in the record which connects the defendant with the use of such language, such testimony being highly prejudicial to the defendant, it is reversible error to allow such testimony to go to the jury.

3. In order to make an alleged threat of the defendant against the deceased admissible, it must appear from circumstances in evidence, with a reasonable degree of certainty, that the defendant directed the threat in question against the deceased before it can be admitted in evidence against him, and if the circumstances in proof leave this matter in doubt, that doubt must be resolved in favor of the defendant and the threat excluded.

4. That portion of an instruction in a trial for homicide which reads: "Malice includes not only anger, hatred and revenge, but every other unlawful and unjustifiable motive," is erroneous, as it tends to lead the jury to believe that they would be justified in finding that an act was done with malice if done in anger. Whereas a killing done in anger might amount only to manslaughter.

5. In an instruction in a trial for homicide wherein the court seeks to define the difference between the first and second degrees of murder, and uses the following language: "But while the purpose, the intent and its execution may follow thus rapidly upon each other, it is proper for the jury to take into consideration the shortness of such interval in considering whether such sudden and speedy execution may not be attributed to sudden passion and anger, rather than to deliberation and premeditation, which must characterize the higher offense," the giving of such instruction is misleading and erroneous, when read in connection with instruction No. 8 defining malice, in that it purports to include in the definition of murder in the second degree elements which tend to constitute only manslaughter.

6. The giving of the following instruction in a trial for homicide: "That if you believe, beyond a reasonable doubt, that the deceased was engaged in assaulting the defendant, then you may take into consideration the relative size and strength of deceased and the defendant," places the burden upon the defendant, which is without warrant in law, because it requires him to establish some element of his defense beyond a reasonable doubt.

7. In a trial for homicide the defendant is not required to establish circumstances in mitigation or that justify or excuse his act, either beyond a reasonable doubt or by a preponderance of the evidence, but is only bound to prove such circumstances as any fact is to be proven, and if the proof on the whole creates a reasonable doubt of the defendant's guilt, he is entitled to an acquittal.

Argument for Appellant.

8. In this case the court gave the following instruction: "The court instructs you, as a matter of law, that when the defendant testified as a witness in this case, he became as any other witness and his credibility is to be tested by, and subject to the same tests as are legally applied to any other witness; and in determining the degree of credibility that shall be accorded his testimony, the jury have a right to take into consideration the fact that he is interested in the result of the trial, as well as his demeanor and conduct upon the witness-stand, and during the trial, and whether or not he has been contradicted or corroborated by other witnesses or circumstances." This instruction is erroneous, in that it singles out the defendant as a witness and calls the attention of the jury particularly to the matter of his credibility. Instructions as to the credibility of witnesses should be general, and apply to all of the witnesses for the state and the defendant.

[As to admissibility of evidence of threats in prosecutions for murder, see note in 89 Am. St. 691.]

APPEAL from the District Court of the Fifth Judicial District, for Power County. Hon. J. J. Guheen, Judge.

Prosecution for murder. From a judgment of conviction, defendant appeals. *Reversed and remanded.*

O. R. Baum, W. G. Griswold and W. G. Bissell, for Appellant.

The court allowed the state, over the objection of the defendant, to cross-examine the defendant upon matters not testified to upon direct examination, which was reversible error. (*State v. Anthony*, 6 Ida. 383, 55 Pac. 884; *People v. O'Brien*, 66 Cal. 602, 6 Pac. 695; *State v. Saunders*, 14 Or. 300, 12 Pac. 441; *People v. Arrighini*, 122 Cal. 121, 54 Pac. 591; *Lewis v. Territory*, 7 Ariz. 52, 60 Pac. 694; Cooley's Constitutional Limitations, 5th ed., 386.)

The definition of malice in instruction No. 8 was erroneous; the court instructed the jury that, "Malice not only includes anger, hatred and revenge, but every other unlawful and unjustifiable motive." Mere anger does not of itself purport malice. (*Chandler v. State*, 141 Ind. 106, 39 N. E. 444.)

Instructions which in effect tell the jury that if they find there was no premeditation and deliberation, and that the kill-

Argument for Respondent.

ing was the result of and could be attributed to sudden passion and anger, then they should find defendant guilty of murder in the second degree, are clearly erroneous, for killing which can be attributed to sudden passion and anger is by our code especially made manslaughter. (Sec. 6565, Rev. Codes; *People v. Freel*, 48 Cal. 436; *State v. Vaughn*, 22 Nev. 285, 39 Pac. 733; *State v. Buster*, 28 Ida. 110, 152 Pac. 196.)

The burden of proof never shifts to the defendant to establish any part of his defense, either satisfactorily or beyond a reasonable doubt. (*Appleton v. People*, 171 Ill. 473, 49 N. E. 708; *Lovejoy v. State*, 62 Ark. 478, 36 S. W. 575; *People v. Perini*, 94 Cal. 573, 29 Pac. 1027.)

The defendant is never required to satisfy the jury of anything. If the evidence falls short of producing satisfaction and raises a reasonable doubt of defendant's guilt, he is entitled to an acquittal. (*Boykin v. People*, 22 Colo. 496, 45 Pac. 422; *Trogdon v. State*, 133 Ind. 1, 32 N. E. 725; *State v. Pierce*, 8 Nev. 291; *State v. McCluer*, 5 Nev. 132.) The defendant is never required to prove any of the facts constituting his defense beyond a reasonable doubt, and to so instruct is error. (*People v. McCann*, 16 N. Y. 58, 69 Am. Dec. 642; *Foley v. State*, 11 Wyo. 464, 72 Pac. 627.)

T. A. Walters, Atty. Genl., A. C. Hindman and J. Ward Arney, Assts., and Spencer L. Baird, for Respondent.

The direct examination of defendant was of such a sweeping character as to permit the state to go into all features of the case that were relevant and material, and the cross-examination of defendant by the state was entirely competent in its scope. (*State v. Larkins*, 5 Ida. 200, 47 Pac. 945; *State v. Anthony*, 6 Ida. 383, 55 Pac. 884; *State v. Gruber*, 19 Ida. 692, 704, 115 Pac. 1.)

The words charging the crime in the information did not actually prejudice the defendant or tend to his prejudice in respect to a substantial right. (*State v. Larkins*, 5 Ida. 200, 212, 47 Pac. 945.)

There is placed on the defendant the burden of affirmatively establishing that which defendant seeks to prove, i. e., justifi-

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cation. (*People v. Milner*, 122 Cal. 172, 54 Pac. 833, 837; *People v. Matthai*, 135 Cal. 442, 67 Pac. 695; *Culpepper v. State*, 4 Okl. Cr. 103, 140 Am. St. 668, 111 Pac. 683, 31 L. R. A., N. S., 1166; *State v. Bogris*, 26 Ida. 587, 600, 144 Pac. 789; *State v. Webb*, 6 Ida. 428, 55 Pac. 892; *State v. Shuff*, 9 Ida. 115, 131, 72 Pac. 664.)

Error in one instruction does not constitute a ground for reversal when the other instructions of the case, considered as a whole, result in no prejudice to the defendant. (*State v. Bond*, 12 Ida. 424, 86 Pac. 43; *State v. O'Neil*, 24 Ida. 582, 135 Pac. 60; *People v. T. Wah Hing*, 15 Cal. App. 195, 114 Pac. 418.)

Instructions Nos. 7 and 8 properly advised the jury as to premeditation, and do not exceed the express decision of this court upon the point in *State v. Shuff*, 9 Ida. 115, 128, 72 Pac. 664; *People v. McDonald*, 2 Ida. 10, 1 Pac. 345.

Instruction No. 18, as given, is a *verbatim* copy of an instruction expressly approved in *State v. Shuff*, *supra*, an authority in this regard which has not been overthrown. The question in this sort of a case does not hinge on anger and passion, but on malice, premeditation and deliberation.

BUDGE, C. J.—Appellant was informed against on Nov. 29, 1915, for the crime of murder alleged to have been committed on or about June 24, 1915, in the village of American Falls, Power county. He was tried and convicted of murder in the second degree and sentenced to the penitentiary for not less than twenty nor more than forty years. A motion for a new trial was overruled and this appeal is from the judgment and from the order overruling the motion for a new trial. The charging part of the information reads as follows:

“That the said E. D. Rogers on or about the 24th day of June, 1915, in the village of American Falls, County of Power, State of Idaho, did then and there, in and upon one, Clyde Cross, feloniously, wilfully, and of his malice aforethought, did make an assault; and the said E. D. Rogers, with a certain knife, the said Clyde Cross then and there being feloniously, wilfully, and of his malice aforethought, did strike,

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stab, and thrust, giving to the said Clyde Cross then and there with the knife aforesaid, in and upon the body of said Clyde Cross, four mortal wounds, of which said mortal wounds, the said Clyde Cross thence continually languished, until on the 25th day of June, 1915, in said County, he, the said Clyde Cross died; that the said E. D. Rogers in manner and form aforesaid, did then and there, feloniously, wilfully, and of his malice aforethought, kill and murder the said Clyde Cross."

Appellant attacks the sufficiency of this information and his first and second assignments of error are directed against certain alleged errors of punctuation. While it is true that the language of the information is awkward, we think it sufficiently clear to enable a person of common understanding to know what is intended—and this satisfies the requirements of sec. 7677, Rev. Codes.

Appellant's third assignment of error: "That the Court erred in overruling defendant's motion for a new trial," is well taken, as will appear from the discussion hereinafter contained concerning some of the alleged errors involved in appellant's other assignments of error.

Appellant's fourth assignment of error: "That the Court erred in permitting the defendant to be cross-examined concerning matters not testified to upon direct examination," particularly in so far as said cross-examination relates to matters testified to on behalf of the state by the witnesses Levi Jones, his wife and daughter, W. F. Glorifield and Walter Sherrod, is well taken. The reason for so holding will appear from the discussion of appellant's fifth assignment of error, which is as follows:

"That the Court erred in allowing the witnesses Levi Jones, Mrs. Levi Jones and Miss Stella Jones, W. F. Glorifield and Walter Sherrod to be examined upon immaterial matters."

In discussing the latter assignment of error it will be necessary to consider, first, the testimony of the Joneses; and, second, the testimony of Glorifield and Sherrod. It appears from the record that when the testimony of the Joneses was offered on behalf of the state and appellant interposed his objection, the prosecuting attorney promised to connect up the testimony

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of the Joneses by other testimony, with appellant. It does not appear, however, from the testimony of any witness, or from any evidence in the record, that this testimony was ever in any way connected with the appellant, at least in so far as the same might be material to the issue in the case.

The testimony of the Joneses must be regarded as highly prejudicial to the appellant, for the reason that it leaves the insinuation that appellant was such a vile and loathsome character that he would use the language referred to specifically by the witness Levi Jones, in the presence of ladies. It is unnecessary to refer in this opinion to the exact language used as shown by the record; suffice it to say that the language is unfit to be spread upon the records of this court. As above indicated, there is no evidence in the record which in any way connects appellant with the use of said language, and to permit the witnesses to testify in regard to it could not, it seems to us, but have the most prejudicial effect upon the jury.

The testimony of Glorifield and Sherrod was highly prejudicial to appellant, and clearly inadmissible under the rule announced by this court in the case of *State v. Buster*, 28 Ida. 110, 152 Pac. 196, where the court said:

“The true rule is that the circumstances themselves in connection with the threat must, with a reasonable degree of certainty, establish the fact that appellant alluded to or directed the threat in question against the deceased, before it can be admitted in evidence against him; and, if the circumstances in proof leave this matter in doubt, that doubt must be solved in favor of the defendant and the threat excluded.”

There is nothing in the record which would indicate in the remotest manner that appellant was insulting to or directing his remarks toward deceased when he made the alleged threats. In this connection we desire to call attention to the testimony of the witness Sherrod, which was in part as follows:

“Q. What did the defendant do at that time?

“A. Well, he come up, and he wanted to borrow my coat, and I says to him, I says: ‘I will have to have my coat to hide my dirty shirt,’ and he says to me: ‘My shirt is dirtier than yours,’ and picked up the coat and put it on.

“Q. What did you tell him?

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"A. Well, I says to him: 'I don't care if you wear my coat, but be careful, and not get it cut up, like the scrape last night,' that was the first thing we heard of when we come to town, about the matter the night before.

"Q. What did he say?

"A. He says: 'If there is any cutting done, I will be there,' or something to that effect, or remark. He said it in a joshing way."

These statements of appellant cannot by any stretch of the imagination be said to allude to or to be directed toward deceased, or to constitute such a threat as would indicate that the appellant had deceased in mind when he made the statements; hence the testimony should have been excluded under the rule above quoted in the *Buster* case.

Appellant's seventh assignment of error relates to certain instructions given by the court which it is alleged by appellant are erroneous and prejudicial, and refers particularly to instructions Nos. 7, 8, 9, 10, 11, 18 and 30. We will confine this opinion to a discussion of instructions Nos. 8, 18, 9, 10 and 30, only. That portion of instruction No. 8 to which appellant takes exception reads as follows:

"Malice includes not only anger, hatred and revenge, but every other unlawful and unjustifiable motive."

We think this instruction should not have been given. As was said by Chief Justice Shaw in *Commonwealth v. York*, 9 Met. (Mass.) 93-104, 43 Am. Dec. 373:

"Malice, although in its popular sense it means hatred, ill will or hostility to another, yet, in its legal sense, has a very different meaning, and characterizes all acts done with an evil disposition, a wrong and unlawful motive or purpose; the wilful doing of an injurious act without lawful excuse."

The same opinion quotes the opinion of Mr. Justice Bailey, in *Bromage v. Prosser*, 4 Barn. & C. 255, giving the legal description of malice in contradistinction to the popular sense in which the term is commonly used, as follows:

"Malice, in common acceptation, means ill will against a person; but in its legal sense it means, a wrongful act, done intentionally, without just cause or excuse. . . . "

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The instruction as given was misleading, in that it would lead the jury to believe that they would be justified in finding that an act was done with malice if done in anger. Whereas a killing done in anger might amount only to manslaughter, which is the unlawful killing of a human being without malice.

An examination of instruction No. 2 discloses the fact that malice was correctly and sufficiently defined by said instruction, and instruction No. 8 only added confusion to the definition there given, and while these instructions, standing alone, in and of themselves may not be sufficient to warrant a reversal of the case, yet when considered with other errors occurring upon the trial must be regarded as prejudicial. Nor is it any answer to this objection to say that instruction No. 2 correctly stated the law upon the subject. The result served to confuse the jury, and renders it impossible to determine whether in their deliberations they followed the law as correctly or as incorrectly set before them. (*People v. Campbell*, 30 Cal. 312; *People v. Anderson*, 44 Cal. 65; *People v. Wong Ah Ngow*, 54 Cal. 151, 35 Am. Rep. 69; *People v. Messersmith*, 57 Cal. 575; *People v. Thompson*, 93 Cal. 506, 28 Pac. 589; *People v. Pearne*, 118 Cal. 154, 50 Pac. 376.)

In the 18th instruction given by the court, wherein the court was attempting to define the difference between murder in the first degree and murder in the second degree, we find the following charge:

“But while the purpose, the intent and its execution may follow thus rapidly upon each other, it is proper for the jury to take into consideration the shortness of such interval in *considering whether such sudden and speedy execution may not be attributed to sudden passion and anger*, rather than to deliberation and premeditation which must characterize the higher offense.” (Italics ours.)

While this instruction was approved by this court in *State v. Shuff*, 9 Ida. 115-128, 72 Pac. 664, the objectionable portion above italicized was not there discussed, and no objection appears to have been taken thereto. However, the instruction was clearly misleading, in that it purports to include in the definition of murder in the second degree elements which

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are present and tend to constitute only manslaughter. This distinction was clearly pointed out in the concurring opinion of Angellotti, J., in the case of *People v. Maughs*, 149 Cal. 253, 266, 86 Pac. 187-192, which concurring opinion was concurred in by Shaw and Sloss, JJ. The charge in the instruction there construed was essentially the same as the charge above quoted from instruction No. 18, in the case at bar. In his concurring opinion Angellotti, J., said: "The statements contained in this information would have been material in determining as between murder and manslaughter, but as between the two degrees of murder they had no place, and we are unable to say that they did not mislead the jury to the prejudice of the defendant." (*People v. Freel*, 48 Cal. 436; *People v. Crowey*, 56 Cal. 36; *People v. Kernaghan*, 72 Cal. 609, 14 Pac. 566; *People v. Bruggy*, 93 Cal. 476, 29 Pac. 26; *State v. Vaughan*, 22 Nev. 302, 39 Pac. 733.)

We will now discuss instructions Nos. 9 and 10, respectively, to which exceptions are taken. These instructions are identical in so far as the point involved is concerned. The particular charge complained of, is: "That if you believe beyond a reasonable doubt that the deceased was engaged in assaulting the defendant then you may take into consideration the relative size and strength of the deceased and the defendant."

Appellant urges that this instruction places a burden upon the defense, which is unwarranted in law, in that it requires him to establish some element of his defense beyond a reasonable doubt. We have made a very diligent search of the authorities bearing upon the charge used in this instruction; only one case has been found where a similar instruction was held not erroneous, which was the case of *Patterson v. People*, 46 Barb. (N. Y.) 625. The court there attempts to distinguish the case of *People v. McCann*, 16 N. Y. 58, 69 Am. Dec. 642, cited by appellant in the case at bar, and upheld the instruction complained of, requiring the defendant to establish the defense of insanity beyond a reasonable doubt. But the New York court, in the later case of *People v. Schryver*, 42 N. Y. 1-8, 1 Am. Rep. 480, where the same question was again presented, speaking through Earl, C. J., said:

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“The judge presiding at the trial of this case is said to have followed in his charge the case of *Patterson v. People*, 46 Barb. (N. Y.) 625, in which, in a case of homicide, it was held in substance that the prisoner was bound to prove his justification beyond a reasonable doubt. No authority is cited to uphold this rule, and it is clearly against every authority that can be found in the books.”

The early Massachusetts cases adhered to the doctrine that the killing being proven or admitted, the defendant to establish excuse or justification must do so by preponderance of the evidence. (*Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *Commonwealth v. Rogers*, 7 Met. (Mass.) 500, 41 Am. Dec. 458; *Commonwealth v. York*, 9 Met. (Mass.) 93, 43 Am. Dec. 373; *Commonwealth v. Knapp*, 10 Pick. (Mass.) 477, 20 Am. Dec. 534.) But the later cases in the same jurisdiction have relaxed the rule and have adhered to the more modern rule, that if the evidence of the defendant which tended to prove excuse or justification was such that taken together with the other evidence, the jury were left in reasonable doubt as to whether or not the defendant was guilty, they should acquit him. *Commonwealth v. Choate*, 105 Mass. 451, *Commonwealth v. Pomeroy*, 117 Mass. 143 (reported in Whart. Hom., 2d ed., Appendix), and cited in the opinion of Mr. Justice Harlan, in *Davis v. United States*, 160 U. S. 469–483, 16 Sup. Ct. 353, 40 L. ed. 499, in connection with the following quotation:

“It was contended by the prosecution that the question of sanity, raised by the defendant, was to be determined by the preponderance of proof; that the commonwealth was not bound to prove the sanity of the accused beyond a reasonable doubt. But the court said: ‘The burden is upon the government to prove everything essential beyond a reasonable doubt; and that burden, so far as the matter of sanity is concerned, is ordinarily satisfactorily sustained by the presumption that every person of sufficient age is of sound mind and understands the nature of his acts. But when the circumstances are all in, on the one side and on the other; on the one side going to show a want of adequate capacity, on the

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other side going to show usual intelligence,—when the whole is in, the burden rests where it was in the beginning, upon the government to prove the case beyond a reasonable doubt.’ ”

In the case of *Commonwealth v. York*, *supra*, Mr. Justice Wilde wrote a very able dissenting opinion, holding that: “The burden of proof, in every criminal case, is on the Commonwealth to prove all the material allegations in the indictment; and if, on the whole evidence, the jury have a reasonable doubt whether the defendant is guilty of the crime charged they are bound to acquit him.”

The dissenting opinion of Mr. Justice Wilde, *supra*, has been followed in the later Massachusetts cases and is now the law in that jurisdiction. (*Commonwealth v. Heath*, 11 Gray (Mass.), 304; *Commonwealth v. Choate*, *supra*; *Commonwealth v. Pomeroy*, *supra*.)

In the case of *Davis v. United States*, *supra*, the court, after reviewing the English, Massachusetts, New York, New Jersey, Illinois, New Hampshire, Michigan, Mississippi, Tennessee and Indiana cases, *Guiteau's Case*, 10 Fed. 161, and the previous cases in the supreme court of the United States, said:

“It seems to us that undue stress is placed in some of the cases upon the fact that in prosecutions for murder the defense of insanity is frequently resorted to and is sustained by the evidence of ingenious experts whose theories are difficult to be met and overcome. Thus, it is said, crimes of the most atrocious character often go unpunished, and the public safety is thereby endangered. But the possibility of such results must always attend any system devised to ascertain and punish crime, and ought not to induce the courts to depart from principles fundamental in criminal law, and the recognition and enforcement of which are demanded by every consideration of humanity and justice. No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.”

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From our examination of the authorities we are convinced that the more modern and the better rule, and the rule which more nearly agrees with the fundamental principles not only of criminal law but of humanity and justice, is to the effect that the defendant is not required to establish circumstances in mitigation or that justify or excuse his act, either beyond a reasonable doubt or by a preponderance of the evidence, but is only bound to prove such circumstances as any fact is to be proved, and if the proof creates a reasonable doubt of the defendant's guilt, he is entitled to an acquittal, and the jury should be so instructed. (Cases in point, *supra*; *Alexander v. People*, 96 Ill. 96; *Appleton v. People*, 171 Ill. 473, 49 N. E. 708; *Trogdon v. State*, 133 Ind. 1, 32 N. E. 725; *Lovejoy v. State*, 62 Ark. 478, 36 S. W. 575; *Lewis v. State*, 29 Tex. App. 105, 14 S. W. 1008; *State v. McCluer*, 5 Nev. 132; *State v. Pierce*, 9 Nev. 291; *Boykin v. People*, 22 Colo. 496, 45 Pac. 419; *Foley v. State*, 11 Wyo. 464, 72 Pac. 627; *Culpepper v. State*, 4 Okl. Cr. 103, 140 Am. St. 668, 111 Pac. 679, 31 L. R. A., N. S., 1166; *McClatchey v. State* (Okl. Cr.), 152 Pac. 1136; *Smith v. State* (Okl. Cr.), 159 Pac. 668.)

The early California cases adhered to the doctrine that the defendant must prove such circumstances by a preponderance of the evidence. (*People v. Hong Ah Duck*, 61 Cal. 395; *People v. Ratén*, 63 Cal. 422.) But these cases were expressly departed from and the modern rule above announced adhered to by *People v. Bushton*, 80 Cal. 160, 22 Pac. 127, 549. The California cases following *People v. Bushton*, *supra*, are reviewed briefly in the recent case of *People v. Petruzo*, 13 Cal. App. 569, 110 Pac. 325; see, also, *People v. Ribolsi*, 89 Cal. 492, 26 Pac. 1082; *People v. Perini*, 94 Cal. 573, 29 Pac. 1027; and also the discriminating case of *State v. Vacos*, 40 Utah, 169, 120 Pac. 497.

The more modern rule was followed by the Montana court in *State v. Crean*, 43 Mont. 47, Ann. Cas. 1912C, 424, 114 Pac. 603, citing *People v. Bushton*, *supra*, with approval.

This court in discussing a similar question indicated that an instruction requiring a defendant to establish justification or

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excuse by preponderance of the evidence was erroneous. (*State v. Shuff, supra; State v. Webb*, 6 Ida. 428, 55 Pac. 892.)

As to instruction No. 30, we have to say that this instruction has no doubt been frequently given by trial courts of this state. Nevertheless, upon a careful examination of the language here used, and of the authorities, we are convinced that it is erroneous and prejudicial to the rights of the appellant. This instruction reads as follows:

“The court instructs you, as a matter of law, that when the defendant testified as a witness in this case, he became as any other witness and his credibility is to be tested by and subject to the same tests as are legally applied to any other witness; and in determining the degree of credibility that shall be accorded his testimony, *the jury have a right to take into consideration the fact that he is interested in the result of the trial, as well as his demeanor and conduct upon the witness-stand, and during the trial, and whether or not he has been contradicted or corroborated by other witnesses or circumstances.*” (Italics ours.)

The words italicized, it is insisted by counsel for appellant, are prejudicial, for the reason that the defendant is singled out and the attention of the jury is particularly directed to his credibility as a witness. We think the better rule for the court to follow is not to single out any special witness personally and burden his testimony with any suggestions which might indicate to the jury that in the opinion of the court such witness was liable to testify falsely. Instructions as to the credibility of a witness should be general, and apply equally to all of the witnesses for the state and the defendant alike. Because a witness may be the defendant is no particular reason why he should be visited with condemnation upon the one hand or clothed with sanctity upon the other. He is before the court as a witness and should be treated by both the court and the jury just as other witnesses are treated, no better and no worse. And the giving of such instruction cannot be regarded as otherwise than erroneous. (*People v. Maughs, supra; Fletcher v. State*, 2 Okl. Cr. 300, 101 Pac. 599, 23 L. R. A., N. S., 581; *Culpepper v. State, supra; Buck-*

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ley v. State, 62 Miss. 705; *State v. Webb*, *supra*; *People v. Vereneseneckcockhoff*, 129 Cal. 497, 58 Pac. 156; 2 Thompson, Trials, 2d ed., sec. 2421; *Banks v. State*, 2 Okl. Cr. 339, 101 Pac. 610; *Crow v. State*, 3 Okl. Cr. 428, 106 Pac. 556.)

For the reasons above expressed we have reached the conclusion that appellant did not have the fair and impartial trial to which the laws of this state entitle him.

The judgment is reversed and the cause remanded, with instructions to the trial court to grant the appellant a new trial.

Morgan and Rice, JJ., concur.

Petition for rehearing denied.

(March 31, 1917.)

CHARLES JAIN and JESSIE JAIN, His Wife, and W. E. TIPTON and NELLIE TIPTON, His Wife, Appellants,
v. WILLIAM PRIEST and MARIE PRIEST, His Wife,
Respondents.

[164 Pac. 364.]

HABEAS CORPUS—JUDGMENT OF DISTRICT COURT APPEALABLE—JURISDICTION OF SUPREME COURT TO MAKE WRIT RETURNABLE BEFORE ANY DISTRICT COURT—CUSTODY OF CHILDREN—EVIDENCE—PRIVILEGED COMMUNICATIONS—GUARDIANSHIP OF MINOR BY BENEVOLENT CORPORATION—BY PARENTS—AUTHORITY FOR ORDER OF ADOPTION—JURISDICTION OF PROBATE COURT—NOTICE OF PROCEEDINGS—CONFLICT OF EVIDENCE.

1. The judgment of a district court in a *habeas corpus* proceeding, involving the custody of a child, is appealable.

2. The supreme court is authorized to make a writ of *habeas corpus* issued by it returnable before any district court.

3. Where children have been removed from the custody of their parents by the probate court because of certain faults of the parents, specified in the findings and order of the court, and the question as to whether the parents have overcome these faults and permanently reformed arises in a subsequent proceeding by which the

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parents attempt to regain the custody of the children, the material evidence is evidence as to the conduct of the parents since the children were taken from them, and the exclusion of evidence of their conduct before that time on the ground of immateriality is not error.

4. Even if certain testimony of a physician should have been excluded on the ground of privileged communication, still the admission of it is not reversible error where the patient, who was also a witness, testified on her cross-examination to substantially everything to which the doctor testified. As to whether the testimony should have been admitted over the objection of appellant, there being nothing in the record to show that the witness expressly consented that the testimony might be given, *quære*.

5. When a benevolent or charitable corporation is made the guardian of a child by order of the probate court under the provisions of an act of the 10th session, approved March 6, 1909, Sess. Laws 1909, p. 38, the probate court has the same control over such corporation as guardian as over any other guardian. Such guardianship may be terminated by said court in the same manner in which any other guardianship may be terminated.

6. While such corporation may voluntarily resign the guardianship or apply to the court for permission to surrender the children to the parents, the ultimate decision as to whether the guardianship shall be terminated or the children surrendered to the parents is with the probate court in each case.

7. Whenever it appears to the probate court on application of the ward or otherwise that the guardianship is no longer necessary, it may be terminated. Reasonable notice of the proceedings and termination of the guardianship should be given the guardian.

8. That certain order made by the probate court for Shoshone county in this case on October 2, 1915, has the force and effect of an order terminating the guardianship of the Idaho Children's Home Finding and Aid Society. Under the facts of this case the society had sufficient notice of the proceedings to be bound by such order.

9. Such benevolent or charitable corporation, as guardian of minor children, has no authority to consent to their adoption when the children are not surrendered to it by the parents, but are committed to it as guardian by the probate court in a proceeding by which they are taken from the parents without their consent.

10. Under sec. 2703, Rev. Codes, a probate judge is not authorized to make an order of adoption of children without the consent of their parents, on the ground that such parents have been judicially deprived of their children on account of neglect, unless it appears in the record before such judge that such is a fact.

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11. A probate judge is not authorized to make an order of adoption of children without the consent of the parents on the ground that the parents have been judicially deprived of the custody of their children on account of neglect, unless it appears in the record before him that the parents have been permanently and absolutely deprived of such custody by a final and unconditional judgment of a court. An order of a probate court temporarily depriving the parents of the custody of their children, but granting them an opportunity to reclaim the children upon a proper showing of reform, is not such a judgment as dispenses with the necessity for the consent of the parents to an adoption proceeding.

12. That certain order of the probate court of Shoshone county in this case made on October 2, 1915, by which the children of appellants were removed from their custody and committed to the custody of the Idaho Children's Home Finding and Aid Society, as guardian, does not permanently and absolutely deprive the parents of the custody of their children, and is not such a final and unconditional judgment as dispenses with the necessity of the consent of the parents to adoption proceedings.

13. As to whether the parents must in all cases be notified of adoption proceedings in order to make the same binding upon them, *quære*.

14. The parents of minor children, being themselves competent to transact their own business, and not otherwise unsuitable, are entitled to the guardianship and custody of said children. (Rev. Codes, sec. 5774.)

15. There being a substantial conflict in the evidence as to whether the parents have reformed and are now suitable persons to have the custody of their minor children, the findings of the district court in favor of the appellants on that point will not be disturbed by this court on appeal.

[As to the custody of children and to whom it should be awarded under *habeas corpus*, see note in 20 Am. Dec. 330.]

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. William W. Woods, Judge.

On application of William Priest and Marie Priest, writs of *habeas corpus* were issued out of this court for William Priest and Ruth Priest, minor children of said applicants, and made returnable in the District Court of the First Judicial District.

Argument for Respondents.

Appeal is taken from the judgment of that court ordering the children returned to their parents. *Affirmed.*

John Nisbet, for Appellants.

The children's welfare is the guiding star. (*Adriano v. Yates*, 12 Ida. 618, 87 Pac. 787; *Schultz v. Roenitz*, 86 Wis. 31, 39 Am. St. 873, 56 N. W. 194, 21 L. R. A. 483; *Jacob v. Sheets*, 99 Ind. 328; *In re Hamilton*, 66 Kan. 754, 71 Pac. 817; *Filbert v. Schroeder*, 37 Neb. 571, 56 N. W. 307; *Rice v. Rice*, 21 Tex. 58; *In re Hickey*, 85 Kan. 556, 118 Pac. 56, 41 L. R. A., N. S., 564; *In re Sharp*, 15 Ida. 120, 96 Pac. 563, 18 L. R. A., N. S., 886.)

The probate court of Shoshone county made an order removing the Children's Home Finding and Aid Society from its guardianship, *ex parte*, and without in any manner notifying the guardian of such proceedings. Before this order could be binding on the society it would be necessary for the children to be in Shoshone county at the time of the filing of the petition; there must be a complaint to the probate court and a showing that the children are not being properly cared for; the guardian must have a reasonable notice of the proceeding. (*In re Sharp*, 15 Ida. 120, 96 Pac. 563, 18 L. R. A., N. S., 886; 1909 Sess. Laws, sec. 1, subn. (d), p. 39.)

Under sec. 2703, Rev. Codes, the guardian could consent to the adoption of the children, since the parents had been deprived of the children on account of their neglect of the children and their immoral conduct. (*In re McRae*, 189 N. Y. 142, 12 Ann. Cas. 505, 81 N. E. 956.)

Featherstone & Fox, for Respondents.

The jurisdiction of the supreme court in issuing a *habeas corpus* writ pursuant to its constitutional and statutory authority is not limited to the jurisdiction of the district where the children are. (*People v. Booker*, 51 Cal. 317.)

The probate courts are courts of original jurisdiction in the matter of guardianship (*In re Sharp*, 15 Ida. 120, 96 Pac. 563, 18 L. R. A., N. S., 886; secs. 3840, 3842, 3810, Rev. Codes),

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and courts of record. (*Dewey v. Schreiber Implement Co.*, 12 Ida. 280, 85 Pac. 921.)

An order for adoption is not a judgment. (*In re Williams*, 102 Cal. 70-76, 41 Am. St. 163, 36 Pac. 407; *Estate of Camp*, 131 Cal. 469, 82 Am. St. 371, 63 Pac. 736; *Estate of Stevens*, 83 Cal. 322, 17 Am. St. 252, 23 Pac. 379.)

It is only in cases of the most imperative necessity where it appears that serious and permanent detriment to the rights and interest of the child are threatened, that courts will deprive the father and mother of the custody of the children. (*In re Wilson* (N. J.), 55 Atl. 160, 162; *Markwell v. Pereles*, 95 Wis. 406, 69 N. W. 798; *Terry v. Johnson*, 73 Neb. 653, 103 N. W. 319; *Van Auken v. Wieman*, 128 Iowa, 476, 104 N. W. 464.)

Where the evidence is conflicting, a finding will not be disturbed. (*Cameron Lumber Co. v. Stack-Gibbs Lumber Co.*, 26 Ida. 626, 144 Pac. 1014; *Jensen v. Bumgarner*, 28 Ida. 706, 156 Pac. 114; *Pomeroy v. Gordan*, 25 Ida. 279, 137 Pac. 888; *Wolf v. Eagleson*, 29 Ida. 177, 157 Pac. 1122.)

An order appointing a guardian, or for the custody of a child, is temporary. (29 Cyc. 164; *Turner v. Turner*, 93 Miss. 167, 46 So. 413; *McGough v. McGough*, 136 Ala. 170, 33 So. 860; *Patten v. Shapiro*, 154 S. W. 687.)

Due process of law demands notice and an opportunity to be heard. (*Mix v. County Commrs.*, 18 Ida. 695, 112 Pac. 215, 32 L. R. A., N. S., 534; *Eagleson v. Rubin*, 16 Ida. 92, 100 Pac. 765; *Ex parte Martin*, 29 Ida. 716, 161 Pac. 573; *Scott v. McNeal*, 154 U. S. 34-51, 14 Sup. Ct. 1108, 38 L. ed. 896; *Sullivan v. People*, 224 Ill. 468, 79 N. E. 695; *Ex parte Livingston*, 151 App. Div. 1, 135 N. Y. Supp. 328.)

MCCARTHY, District Judge.—This case involves the question of the right to the custody of Ruth Priest and William Priest, the minor children of William Priest and Marie Priest, the respondents. The appellants, W. E. Tipton and Nellie Tipton, claim right to the custody of Ruth Priest, and the appellants, Charles Jain and Jessie Jain, claim right to the custody of William Priest. Two petitions for writs of *habeas*

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corpus were filed in the supreme court by the parents, one alleging that Ruth Priest is unlawfully detained by Mr. and Mrs. Tipton, and the other alleging that William Priest is unlawfully detained by Mr. and Mrs. Jain. A writ was issued in each case and made returnable in the district court of the first judicial district, before Honorable William W. Woods, District Judge. The two cases were consolidated for trial, and the district court ordered the children returned to their parents. From that order and judgment of the district court an appeal is prosecuted to this court by Mr. and Mrs. Tipton and Mr. and Mrs. Jain.

In September, 1914, a petition was filed in the probate court for Shoshone county, alleging that the appellants were not proper persons to have the care and custody of said minor children, and praying that a citation be issued by said court to appellants, requiring them to show cause why said children should not be removed from their custody and control and surrendered to the Idaho Children's Home Finding and Aid Society and treated as wards of the court. A hearing was had. The court found that the appellants were at that time unfit and improper persons to have the control and custody of the said children, and adjudged that the said children should be removed from the custody and control of the appellants and surrendered to the Idaho Children's Home Finding and Aid Society, to be treated as wards of the court. The Idaho Children's Home Finding and Aid Society will hereafter be referred to in this opinion as the society. The children were taken to the branch home of the society at Lewiston, Idaho. The probate judge, the appellants, the representative of the society at Lewiston and everyone else concerned understood that the order was not a final order, permanently depriving the parents of the custody of the children, but merely an order temporarily depriving them of such custody until such time as they should reform and convince the court that they were again entitled to the children.

On Oct. 2, 1915, the probate judge, upon petition of the parents, found that they had reformed and were proper persons to have the care and custody of their children, and made

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a written order to the effect that the children should be removed from the custody of the society and returned to the parents. On the same day he wrote a letter to the representative of the society at Lewiston, inclosing a copy of the order. The representative at first acquiesced in this action, as shown by his letter of Oct. 4th. Having later heard some disquieting rumors concerning the parents, the probate judge, on Oct. 7th, sent a telegram to the representative telling him to hold the children, that other developments made it necessary to revoke the order for their return.

On Oct. 11th, the society, through its state superintendent, consented to the adoption of Ruth Priest by Mr. and Mrs. Tipton, and of William Priest by Mr. and Mrs. Jain. On Oct. 15th, adoption proceedings were had in the probate court for Latah county, by which the Tiptons adopted Ruth Priest and the Jains adopted William. The Jains and Tiptons were residents of Latah county; by permission of the society, Ruth had been living with the Tiptons and William had been living with the Jains for some months prior to the adoption.

On Oct. 11th, the probate judge having satisfied himself that the rumors about the parents were unfounded, wrote the representative of the society stating in effect that after investigation he had decided the children should be returned to the parents, and directed that arrangements be made for that purpose. The society replied that the children had been adopted and that it no longer had control over them. Thereafter the parents sued out writs of *habeas corpus*, resulting in the proceedings above mentioned.

The first question which arises in this case is whether a judgment of a district court in a *habeas corpus* proceeding involving the custody of a child is appealable. While the question is not raised by either of the parties to the action, we think that it is squarely raised by the proceedings and that it is the duty of the court to take notice of it. Sec. 4807, Rev. Codes, as amended by chap. 111, Sess. Laws 1911, provides that an appeal may be taken to the supreme court from a final judgment of the district court in an action or special proceeding commenced in the court in which the same is ren-

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dered. This relates only to civil actions or special proceedings of a civil nature. A proceeding in *habeas corpus* to determine the right to the custody of a child is a proceeding of a civil nature, and more especially of an equitable nature. (*Andrino v. Yates*, 12 Ida. 618, 87 Pac. 787; *Harrison v. Harker*, 44 Utah, 541, 142 Pac. 716; *Telschek v. Fritsch*, 38 Tex. Cr. 43, 40 S. W. 988; *Ex parte Calvin*, 40 Tex. Cr. 84, 48 S. W. 518; *Hall v. Whipple* (Tex. Civ.), 145 S. W. 308-310.)

The judgment or order of the court is a final judgment in the sense that by it the parties to the action are concluded as to the particular issues presented. (*Bleakley v. Smart*, (Kan.), 11 Ann. Cas. 125, 87 Pac. 76; *Cormack v. Marshall*, 211 Ill. 519, 1 Ann. Cas. 256, 71 N. E. 1077, 67 L. R. A. 787; *Hall v. Whipple*, *supra*; *Clifford v. Williams*, 37 Wash. 460, 79 Pac. 1001; *In re Hamilton*, 66 Kan. 754, 71 Pac. 817.) We are of the opinion that the judgment of the court in such a proceeding is a final judgment within the purview of our statute relating to appeals.

We conclude that an appeal lies from the judgment of the district court in such a proceeding. (*Stewart v. Paul*, 141 Ala. 516, 37 So. 691; *Bleakley v. Smart*, *supra*; *Hall v. Whipple*, *supra*; *State v. Baird & Torrey*, 19 N. J. Eq. 481; *Jamison v. Gilbert*, 38 Okl. 751, 135 Pac. 342, 47 L. R. A., N. S., 1133; and other cases cited above.)

The court is not called upon to decide, and does not decide, whether an appeal will lie to this court from the final judgment of the district court in the ordinary *habeas corpus* proceeding involving the legality of the imprisonment of a party by virtue of the commitment of a court.

The specifications of error, so called, are very general, and this court feels it is called upon to specifically notice only those points which counsel has attempted to support by argument or citation of authorities in the briefs or on the argument.

It is contended that the district court of the first judicial district had no jurisdiction, and that the case should have been sent to the district court for Latah county, in which

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county the children were residing. Under secs. 3816 and 8342, Rev. Codes, the supreme court had the authority to make the writ returnable before any district court, and in this case it made it returnable before the district court, where a hearing could be had with the greatest degree of convenience to the witnesses.

It is contended that the court erred in refusing to permit the introduction of testimony relative to the conduct of William and Marie Priest prior to the time that the children were removed from them. Such testimony was offered for the purpose of showing the extent to which the parents were addicted to the use of intoxicating liquor and other bad habits, as tending to show whether or not it would be possible for them to have reformed as claimed. The principal question of fact in the case is whether they had reformed. The findings and order of the probate court stand as evidence against the parents, and the burden was upon them to show that they had corrected the serious faults set forth in said findings. The order of the probate court could not be collaterally attacked by either party to this proceeding. It does not seem, however, that admitting such testimony for the purpose stated, would have had the effect of making a collateral attack upon said order. However, the principal question being whether the parents had reformed, it seems that the material evidence upon the point is evidence as to their conduct since the children were taken from them. From the record in this case we do not think that testimony as to their conduct before that time was sufficiently material to require that it be admitted. The rejection of such testimony was, therefore, justified on the ground of its immateriality.

The alleged error in permitting witnesses to testify relative to what happened in the proceeding in the probate court of Latah county at the time of the alleged adoption of the children is not material, because this court does not think that the mere fact that the children and parties were not examined separately, if it be a fact, would of itself invalidate the proceedings.

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No objection to the testimony of Dr. Dettman on the ground of privileged communication was made in the trial court, and that point cannot be raised for the first time in this court. We do not consider it necessary to pass upon the question as to whether or not the testimony of Dr. Lindsey should have been admitted, for the reason that he testified only in regard to Mrs. Ella Rivers, and she herself on cross-examination admitted practically everything to which the doctor testified, she stating that she had been a slave to the morphine habit for 29 years and six months. In view of this fact the admission of the doctor's testimony, even if erroneous, could not be prejudicial or reversible error.

Most of the other points raised by appellants relate to the question of the validity and effect of the several proceedings had in the probate court, to wit: First, the original proceedings by which the children were taken from their parents and committed to the custody of the Children's Home Finding and Aid Society by order of the probate court for Shoshone county; second, the order of the probate court for Shoshone county by which the guardianship of the society was revoked and the children were ordered returned to their parents; third, the order of adoption of the probate court for Latah county.

We will first consider the force and effect of the order committing the children to the custody of the society. It is ordered by the court that the said children be removed from the custody and control of their parents and surrendered to the society, to be treated as wards of the court. By using the words "wards of the court," it would seem that the probate court intended to retain some control over the children. The probate courts have jurisdiction in guardianship matters. (Const., art. 5, sec. 21.) For this purpose they are courts of general jurisdiction. (*In re Brady*, 10 Ida. 366, 79 Pac. 75; *Ex parte Sharp*, 15 Ida. 120, 96 Pac. 563, 18 L. R. A., N. S., 886.) The legislature has no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a co-ordinate branch of the government. (Const., art. 5, sec. 13.) By the order of the

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probate court, which was made pursuant to the provisions of sec. 2, Sess. Laws 1909, pp. 39, 40 and 41, the society was made the guardian of the children. By virtue of its general jurisdiction the probate court had the same control over the society as guardian as it would have over any other guardian, and this power was one which the legislature could not take from the court. In the latter part of said section 2 it is provided, that the society shall continue to be the guardian during the minority of the children, unless the guardianship is canceled by the board of directors of the society. Said provision cannot have the effect of depriving the probate court of its control over the society as guardian, because to give it such effect would be to invade the jurisdiction of the probate court in violation of the constitution.

Sec. 3 of said act, on page 41, provides that the parents may petition the board of directors of the society, asking that the children be returned to them on the ground that they have reformed, or are in condition to properly care for the children, and if the board, after an investigation, deem it for the best interests of the child, it may be returned to its parents, and the guardianship of the society shall terminate, and the parents shall resume their natural relationship to such child. Such provision cannot have the effect of vesting jurisdiction to decide that the child shall be returned to its parents, exclusively in the board of directors of the society and of depriving the probate court of jurisdiction to decide such matter, because to give it such effect would again be an unconstitutional invasion of the powers and jurisdiction of the probate court. The board of directors may decide for the society whether or not it desires to voluntarily resign the guardianship or to return the children to their parents, but the ultimate decision in each case is with the probate court. The probate court had the same control over the society as guardian as it would have over any other guardian, and it had jurisdiction to revoke the guardianship of the society and return the children to their parents, if a proper showing were made.

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Under sec. 5822, Rev. Codes, a guardian of any person may be discharged by the probate court when it appears to the court, on the application of the ward, or otherwise, that the guardianship is no longer necessary. Under this provision the probate court had authority to discharge the society as guardian of the children and order them returned to their parents at any time when it appeared to the court that the guardianship of the society was no longer necessary. If the parents convinced the probate court, by a proper showing, that they had reformed and were suitable persons to again have custody of their children, then the guardianship of the society would be no longer necessary, and the court could and should discharge the society and return the children to their parents. The statute does not expressly provide for any notice to the guardian before terminating the guardianship. In this it differs from the preceding section (5821, Rev. Codes), concerning the removal of a guardian on the ground of being incapable or unsuitable. That section provides that such notice shall be given to the guardian as the court may require. We think that the nature of the proceeding requires a reasonable notice to the guardian when terminating the guardianship, even though it is not expressly required by the statute. In this case no formal notice was given to the guardian. However, it appears that on Oct. 2, 1915, upon petition of the parents, and after investigation, the probate judge made a written order to the effect that the children be removed from the custody of the society and returned to the parents. He wrote a letter to the representative of the society at Lewiston, inclosing a copy of the order, and telling him that the children should be returned to their parents. The representative at first acquiesced in this action, as shown by his letter of Oct. 4th. Having later heard some disquieting rumors concerning the parents, the probate judge sent a telegram on Oct. 7th to the representative, telling him to hold the children, that other developments made it necessary to revoke the order for their return. Without waiting to hear further from the probate judge, the society consented to the adoption of the children, and instead of holding them as the

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telegram directed, the adoption proceedings were allowed to take place. On Oct. 11th the probate judge again wrote the representative of the society, telling him that after investigation he had found the rumors about the parents to be unfounded; that he had decided the children should be returned to their parents, and that arrangements should be made to that end.

The order of Oct. 2d was in effect an order terminating the guardianship and discharging the society as guardian. There was no formal hearing of the matter. No formal notice was given the society. However, an informal notice was given and its representative at Lewiston was apprised of the fact that the probate court had terminated its guardianship and the reasons for such action. Under the circumstances we think the society had sufficient notice of the order to make that order binding upon it. If the society desired to be heard in objection to the petition of the parents, or the order of the court, it should have made such objection in the probate court for Shoshone county. It would then have been the duty of the court to hear such objection. Upon receipt of the telegram on the 7th, the society should have held the children as directed, instead of putting them beyond its control.

However, the society is not a party to this proceeding. The appellants base their right to the custody of the children upon the orders of adoption made by the probate court for Latah county. Under the provisions of the act of 1909, the society has authority to receive, control and dispose of children under eighteen when the father, mother or person legally entitled to act as their guardian shall surrender them in writing to the society, or when the person legally authorized to make such surrender is not known and a notice is published in a newspaper. When a child shall have been so surrendered and such child shall have been accepted by such society, then (but not otherwise) the rights of its natural parents or of the guardian of its person (if any) shall cease, and such corporation shall become entitled to the custody of such child, and shall have authority to care for and educate

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such child or place it temporarily or permanently in a suitable home in such manner as shall best secure its welfare. Such corporation shall have authority when such child has been surrendered to it in accordance with any of the preceding provisions, and it is still in its control, to consent to its adoption under the laws of Idaho. These provisions are all in sec. 1 of the act. In cases arising under sec. 2, where a child is taken from the parents without their consent on the ground that they are not proper persons to have custody of it, the law does not give the society power to consent to the adoption of the child, nor does it provide that the rights of the natural parents shall cease. In such cases the society simply becomes the guardian of the child, subject to the control of the probate court as heretofore explained. In the present case, the children were not surrendered by the parents, but were removed from their custody by the court without their consent; the case therefore comes, not within sec. 1 but within sec. 2. The society consented to the adoption of the children; the parents did not consent, and in fact were not notified. The adoption proceedings cannot be upheld by virtue of any of the provisions of the law of 1909. The appellants fall back upon the provisions of sec. 2703, Rev. Codes, in relation to adoption. It provides that a legitimate child cannot be adopted without the consent of its parents, except that consent is not necessary from a father or mother who has been judicially deprived of the custody of the child on account of cruelty or neglect. It is claimed that these parents had been judicially deprived of the custody of their children by the order of the probate court for Shoshone county on account of neglect, and that therefore they were not entitled to notice of the proceedings. It appears from the proceeding in the probate court for Latah county that the action of the court was based upon the consent of the society to the adoption, and not upon any allegation or proof that the parents had been judicially deprived of the custody of their children on account of neglect. In order to authorize the probate court to make an order of adoption without the consent of the parents, it must appear in the record before that court that the case

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comes within some of the exceptions mentioned in the statute. This, we think, is a jurisdictional requirement, and must be complied with in order to make the order valid. No such showing was made before the probate court in this case, and therefore the order, made without the parents' consent, was invalid. (*Parsons v. Parsons*, 101 Wis. 76, 70 Am. St. 894, 77 N. W. 147.)

The question as to whether the parents of a child must in all cases be notified of adoption proceedings is a difficult one, as to which the authorities do not agree. Conceding that in the cases mentioned in sec. 2703, Rev. Codes, the consent of the parents to the adoption is not necessary, there is still a question as to whether they should not be notified of the proceedings in order to have an opportunity to show whether or not their consent is necessary. It is indeed drastic to hold that the natural parents may be permanently deprived of their status of parentage and its accompanying rights by a proceeding of which they have no notice. Some authorities seem to have gone this far; some have refused. We do not pass on this vexing question, for the reason that it is not necessary to do so for the purpose of this case.

Even if it should be conceded that the parents were not entitled to notice of adoption proceedings in case they had previously been judicially deprived of the custody of their children on account of neglect, we do not think that this is such a case. When the statute says that the consent of the parents is unnecessary where they have been judicially deprived of custody of their children on account of neglect, we construe it to mean cases where they have been finally and permanently deprived of such custody by a final, absolute and unconditional judgment of the court. In view of the language used in the order of the probate judge for Shoshone county, and under all the facts of this case, we do not think that such order was a final and unconditional judgment, absolutely and permanently depriving the parents of the custody of their children. (*Ex parte Martin*, 29 Ida. 716, 161 Pac. 573.)

Our conclusion is that the probate court of Latah county had no authority to make the orders of adoption without no-

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tice to the parents under the facts of this case, and that the orders of adoption are not binding upon the parents.

From the views above expressed in regard to the several proceedings in the probate court for Shoshone county and the probate court for Latah county, it follows that the legal rights of the parties, so far as the custody of the children is concerned, are not finally concluded by any of said proceedings. Sec. 5774, Rev. Codes, provides that either the father or mother of a minor, being themselves respectively competent to transact their own business, and not otherwise unsuitable, must be entitled to the guardianship of the minor. This section is construed and upheld by this court in *In re Crochcron*, 16 Ida. 441, 101 Pac. 741, 33 L. R. A., N. S., 868. In that case the court, in referring to its former decision in *Andrino v. Yates*, 12 Ida. 618, 87 Pac. 787, makes it clear that it is only where the legal right of the parent to the custody of the child is not clear that the child can be permitted to the custody of another on the ground that it will be better cared for by such other. If the parent fulfills the requirements of sec. 5774, he is entitled to the custody of his child, even though another person may be even more suitable to have the custody. The rights of these parents not being affected by the orders of adoption, they are entitled to the custody of the children if the evidence shows that they are now competent to transact their own business and not otherwise unsuitable. Upon these questions the lower court found in favor of the respondents.

“It is the settled law of this state that an appellate court will not disturb the findings or judgment of the trial court where there is a substantial conflict of the evidence. This rule applies with equal force to actions of law and suits in equity, where a trial is had on oral evidence.” (*Smith v. Faris-Kesl Const. Co.*, 27 Ida. 407, 150 Pac. 25, and other Idaho decisions there cited.) We hold this rule applies to a *habeas corpus* proceeding of a civil nature to determine the right to the custody of children as well as to other actions at law or suits in equity. Upon the question as to whether these parents have reformed and are now proper persons to have the custody

Points Decided.

of their children in view of the requirements of the statute, there is a substantial conflict in the evidence, and therefore the findings and judgment of the trial court will not be disturbed by this court.

The decision of the district court, affirmed by this court, is to the effect that the parents are now entitled to the custody of their children. The parents must understand that their right to maintain such custody in the future depends upon whether they continue to conduct themselves in such a way as to deserve it.

The judgment of the district court is affirmed.

Budge, C. J., and Rice, J., concur.

(April 3, 1917.)

PERRY BASINGER, C. M. MULKEY, A. H. WILLIAMS, J. N. WILDE, W. H. BARTELL, Sr., O. P. WILLIAMS and BLAINE COUNTY IRRIGATION COMPANY, LTD., a Corporation, Appellants, v. E. K. TAYLOR, R. L. SUTCLIFFE, Water-master of Little Lost River District, SAMANTHA J. TAYLOR and J. B. TAYLOR, Respondents.

[164 Pac. 522.]

WATER—WATER RIGHTS—APPROPRIATION—BENEFICIAL USE—PERMITS—DOCTRINE OF RELATION.

1. Under sec. 3 of art. 15 of the constitution, those using water for domestic purposes have a preference over those claiming water for any other use. But in case the water has already been appropriated for another inferior use, the use for a superior purpose is subject to the provision of law regulating the taking of private property for public use.

2. A permit issued by the state engineer is not a water right, and is not in itself evidence of appropriation of water.

3. Under a pleading claiming title to the public waters of this state, a decree must be based upon the amount of water actually diverted and applied to beneficial use.

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Argument for Appellants.

4. An appropriator of water who seeks to invoke the doctrine of relation in order that the date of priority of his appropriation shall relate back to the date of the initiation of his appropriation must show a substantial compliance with all the provisions of the statute, and also final consummation of the appropriation as defined by the statute, and can invoke the doctrine only to the extent of the completion of such appropriation.

5. The holder of a permit issued by the state engineer for the appropriation of water is not entitled to an injunction to prevent the diversion of waters from a stream, unless he shows that he is in a position to make beneficial use of such water.

6. A person entitled to the use of water may change the place of diversion if others are not injured by such change. The right to change the place of diversion is subject to the protection of the rights of other appropriators from the stream.

[As to equitable estoppel as defense to suits to restrain diversion and use of water, see note in *Ann. Cas.* 1914B, 996.]

APPEAL from the District Court of the Sixth Judicial District, for Custer County. Hon. J. M. Stevens, Judge.

Action to quiet title to use of waters. *Reversed.*

Hansbrough & Gagon and Holden & Holden, for Appellants.

Where a large per cent of the waters of a natural stream is lost by seepage and evaporation if permitted to flow in its natural channel, and one person, by the expenditure of money and labor, constructs an artificial water-way and thereby prevents such loss, and delivers to other appropriators upon the stream the amount of water they have been accustomed to receive on their lands, he is entitled to the amount of water so saved. (*Wiel on Water Rights*, 2d ed., 360; *Wiggins v. Muscupiabe Land & Water Co.*, 113 Cal. 182, 54 Am. St. 337, 45 Pac. 160, 32 L. R. A. 667; *Beaverhead Canal Co. v. Dillon Electric Light & Power Co.*, 34 Mont. 135, 85 Pac. 880; *Raymond v. Wimsette*, 12 Mont. 551, 33 Am. St. 604, 31 Pac. 537.)

The person entitled to the use of water may change the place of diversion, if others are not injured by such change. (Sec. 3247, Rev. Codes; *Hard v. Boise City Irr. etc. Co.*, 9 Ida. 589, 76 Pac. 331, 65 L. R. A. 407.)

Argument for Respondents.

The right to change the place of diversion includes cases in which the use of the water amounts to its absorption, or is such as to imply notice to subsequent appropriators that such change may be reasonably expected. (*Last Chance Min. Co. v. Bunker Hill & S. Min. etc. Co.*, 49 Fed. 430.)

A right for domestic use and culinary purposes is not preferred to a right for irrigation purposes, except of the same date. (*Union Mill & Mining Co. v. Dangberg*, 81 Fed. 73.)

The first appropriation of water for useful and beneficial purposes gives the prior right thereto, and the right once vested will be protected and upheld unless abandoned. (*Malad Valley Irr. Co. v. Campbell*, 2 Ida. 411, 18 Pac. 52; *Geertson v. Barrack*, 3 Ida. 344, 29 Pac. 42; *Dunniway v. Lawson*, 6 Ida. 28, 51 Pac. 1032; *Hillman v. Hardwick*, 3 Ida. 255, 28 Pac. 438.)

A prior appropriator of water has a right to the use thereof, which is superior to the claim of a riparian proprietor, not based upon appropriation, but on the doctrine of riparian rights. (*Drake v. Earhart*, 2 Ida. 750, 23 Pac. 541.)

The law declares a water right to be real property. (Sec. 3056, Rev. Codes; *Ada County Farmers' Irr. Co. v. Farmers' Canal Co.*, 5 Ida. 793, 51 Pac. 990, 40 L. R. A. 485; *Hall v. Blackman*, 8 Ida. 272, 68 Pac. 19.)

Where a person claims the right to the use of water by user, the right dates from the time the water is applied to the land for the irrigation thereof. (*Sandpoint Water & Light Co. v. Panhandle Development Co.*, 11 Ida. 405, 83 Pac. 347.)

The state engineer has no authority to interfere with vested rights or to grant a permit for the appropriation and diversion of water, when the same has already been appropriated and applied to beneficial use. (*Youngs v. Regan*, 20 Ida. 275, 118 Pac. 499; *Nielson v. Parker*, 19 Ida. 727, 115 Pac. 488.)

Clark & Brodhead, Higgins & Ambrose and Barber & Davison, for Respondents.

The major portion of the loss was because of the negligence of the individual appellants in the construction and main-

Argument for Respondents.

tenance of the three miles of ditch across the flat from Dry Creek to Wet Creek. (*Bennett v. Nourse*, 22 Ida. 249, 254, 125 Pac. 1038; *Stickney v. Hanrahan*, 7 Ida. 424, 63 Pac. 189.)

One may change the point of diversion, provided he can so do without injury to others, but a subsequent appropriator has a vested right to insist on the continuance of the conditions at the time he made his appropriations and to have the water continue to flow as it flowed when he made his appropriation. (*Bennett v. Nourse*, *supra*; *Wiel on Water Rights*, 3d ed., 302.)

"Preference to those using water for domestic purposes, subject only to the limitations prescribed by law, is granted by the constitution and laws of this state." (Constitution Idaho, sec. 3, art. 15; *Montpelier Mill Co. v. City of Montpelier*, 19 Ida. 212, 113 Pac. 741.)

The claim for water relates back to the date of its first use, and where from year to year the use is extended, the claim to the entire amount relates back to date of first user. (*Brown v. Newell*, 12 Ida. 166, 85 Pac. 385; *Conant v. Jones*, 3 Ida. 606, 32 Pac. 250; *Hall v. Blackman*, 8 Ida. 272, 68 Pac. 19.)

There had been a complete five years' user. The court has held that a four years' user made water appurtenant to the land. (*Furey v. Taylor*, 22 Ida. 605, 606, 127 Pac. 676; *City of Pocatello v. Bass*, 15 Ida. 1, 96 Pac. 120.)

"The right of one who actually diverts water and applies it to beneficial use, although he has never applied to the state engineer for a permit or procured a permit, is superior and paramount to any right a subsequent appropriator can procure." (*Nielson v. Parker*, 19 Ida. 727, 115 Pac. 488, and cases cited; *Gard v. Thompson*, 21 Ida. 485, 123 Pac. 497; *Speer v. Stephenson*, 16 Ida. 707, 102 Pac. 365; *Sandpoint Water etc. Co. v. Panhandle Dev. Co.*, 11 Ida. 405, 406, 83 Pac. 347.)

Respondents are entitled as of June, 1908, a date preceding the appellant irrigation company's right by two years. (*McGinness v. Stanfield*, 6 Ida. 372, 376, 55 Pac. 1020.)

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Where the evidence is conflicting as to the facts, and there is substantial evidence as to the findings of fact by the trial court, findings and decree entered will not be reversed. (*Brinton v. Steele*, 23 Ida. 615, 131 Pac. 662.)

RICE, J.—This action was instituted to quiet title to the waters of Dry Creek, in Custer county, and to restrain the defendant Sutcliffe, as water-master, from interfering with the rights of plaintiffs below, appellants here. All of the appellants, except the Blaine County Irrigation Company, were farmers who had used water from said creek for many years for the irrigation of their lands. They had diverted their water from said Dry Creek, across low land and gravel-bars, through a ditch known as "Farmers' Ditch," and discharged the same into Wet Creek at a point about a mile and a half distant from the place of diversion.

On July 6, 1907, the district court decreed these farmers to be entitled to the use of 22 second-feet of the waters of Dry Creek. About June 1, 1908, respondent Taylor located on Dry Creek and began to prepare his lands for cultivation. The same summer he constructed a ditch leading out of Dry Creek a short distance above the Farmers' Ditch. On October 29, 1910, appellant Blaine County Irrigation Company made application for and received permit from the state engineer for 150 second-feet of the water from Dry Creek. This company began the construction of a pipe-line to divert water from the creek about seven miles above respondent's point of diversion. In July, 1912, the pipe-line was completed and water diverted from Dry Creek into Corral Creek, a tributary of Wet Creek.

At this time the appellants who had used the Farmers' Ditch, by agreement with the Blaine County Irrigation Company, changed their point of diversion to the intake of the pipe-line. By the terms of the agreement their water was thereafter to be diverted through the pipe-line, and thence, by way of Corral Creek and Wet Creek, to the place into which their water had formerly been discharged.

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The trial court in its decree adjudged that all appellants, except the Blaine County Irrigation Company, were entitled in common to 22 second-feet of the waters of Dry Creek, subject only to the right of the respondents E. K. Taylor, Samantha J. Taylor and J. B. Taylor, to water for domestic use, and that such respondents were entitled at all times to have delivered at their point of diversion sufficient water from Dry Creek for domestic uses and culinary purposes, and to have flow in the natural channel of said stream a sufficient quantity of said waters to furnish the same at their point of diversion in good, healthy and normal state.

It is admitted that in point of time, the right of all appellants, excepting the Blaine County Irrigation Company, is superior to any right the respondents may have for domestic and culinary purposes, and that their right by reason of the application of the water to a beneficial use, and the decree of the district court, has become a vested right. It is clear that under the constitution those using water for domestic purposes have the preference over those claiming for any other purpose, but the usage for such superior purpose is subject to the provisions of sec. 14 of art. 1 of the constitution, regulating the taking of private property for public use.

In the case of *Montpelier Milling Co. v. City of Montpelier*, 19 Ida. 212, at p. 219, 113 Pac. 741, 743, the court said:

“It clearly was the intention of the framers of the constitution to provide that water previously appropriated for manufacturing purposes may be taken and appropriated for domestic use, upon due and fair compensation therefor. It certainly could not have been the intention of the framers of the constitution to provide that water appropriated for manufacturing purposes could thereafter arbitrarily and without compensation be appropriated for domestic purposes. This would manifestly be unjust, and clearly in contravention of the provisions of this section, which declare that the right to divert and appropriate the unappropriated waters of any natural stream for beneficial use shall never be denied, and that priority of appropriation shall give the better right.”

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The decree of the trial court in this case, if allowed to take effect, may operate to deprive appellant water users of their property, without compensation, to the extent that they may be deprived at certain seasons of the year of the amount of water necessary for the domestic use of respondents. We think the decree, in that respect, is in contravention of sec. 3 of art. 15, and sec. 14 of art. 1 of the constitution. (*Montpelier Milling Co. v. City of Montpelier, supra*; *Town of Sterling v. Pawnee Ditch etc. Co.*, 42 Colo. 421, 94 Pac. 339, 15 L. R. A., N. S., 238.)

Respondents, however, contend that they have shown an adverse use to the waters of Dry Creek for domestic purposes for a period in excess of five years. We think the evidence fails to show an adverse appropriation by respondents for domestic purposes, and respondents could not claim as riparian proprietors. (*Drake v. Earhart*, 2 Ida. 750, 23 Pac. 541; *Hutchinson v. Watson S. Ditch Co.*, 16 Ida. 484, 133 Am. St. 125, 101 Pac. 1059.)

This is not a proceeding to condemn the property of appellant water users and subject the same to a higher and more beneficial use, but an action to quiet title. The trial court therefore erred in its first and second conclusions of law, to the effect that respondents were entitled at all times to have delivered at their point of diversion sufficient water for domestic uses and culinary purposes, and the decree based thereon is erroneous.

Respondent E. K. Taylor was made party defendant in the original action, and respondents Samantha J. Taylor and J. B. Taylor intervened in the action. By their cross-complaints each respondent alleges title to 6.4 second-feet of the waters of Dry Creek, diverted at or near the center of sec. 15, tp. 10 N., R. 25 E., B. M., which said waters were first diverted from said creek on June 1, 1908, and conducted by means of irrigation works to and used upon certain described lands.

The intervenors did not allege any privity of title or estate between themselves and defendant E. K. Taylor. Each respondent alleges that he has been gradually increasing his

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irrigation works from year to year since June 1, 1908, until the beginning of the irrigation season of 1913, at which time he was diverting and using upon his said lands a certain amount of water. To sustain his title respondent E. K. Taylor introduced in evidence Permit No. 2929, issued by the state engineer on application of L. L. Folsom, dated April 11, 1907, and certificate of the state engineer, dated Nov. 8, 1913, to the effect that E. K. Taylor, holder of Permit No. 2929, had fully complied with the provisions of the laws of the state of Idaho relating to the completion of the works of diversion set out and described in said permit, and that the said works were adequate for diverting and conveying to the place of intended use 15 second-feet of the waters of said Dry Creek. Respondents Samantha J. Taylor and J. B. Taylor neither by allegation or proof show any interest in such permit.

The briefs on file in this case devote much space to a discussion of respondent's title to Permit No. 2929. It appears from the exhibits in the case that L. L. Folsom conveyed Permit No. 2929 to the Custer County Land & Irrigation Company, by deed dated Feb. 18, 1908. The Custer County Land & Irrigation Company, in September, 1908, conveyed the said permit to Ben E. Hervey. In March, 1909, Ben E. Hervey conveyed to the Spokane-Idaho Irrigation & Power Company, Ltd., Permits Nos. 3924, 2929 and 4092, issued by the state engineer of the state of Idaho, with other property, "saving and excepting a sufficient quantity of said water and water rights to irrigate 1,920 acres of land, heretofore expressly reserved and granted unto E. K. Taylor." Defendant Taylor testified that prior to settling upon the lands occupied by him, to which he diverted the waters of Dry Creek, that he had had an agreement with L. L. Folsom, or the Custer County Land & Irrigation Company, as a result of which a deed had been executed to him of Permit No. 2929 and placed in escrow in a bank at Boise, Idaho; that he had made the payments called for by the terms of the escrow agreement, and had arranged to convey his rights to Hervey, with the reservation of sufficient water for his own needs; that upon calling upon the escrow holder for the delivery of the deeds the same

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could not be found, and thereupon, by mutual agreement, the Custer County Land & Irrigation Company conveyed direct to Hervey and Hervey conveyed to the Spokane Company with the reservation set out above.

Admitting the facts to be as above outlined, they fail to show any conveyance of title to respondent E. K. Taylor. The statement reserving a "sufficient quantity of said water and water rights to irrigate 1,920 acres of land, heretofore expressly reserved and granted unto E. K. Taylor," is merely descriptive of the reservation and is not a grant to Taylor. The appellants not being parties to any of the above enumerated conveyances are not affected by the reservation.

Without reference to the question of title, however, respondent Taylor could not rely upon Permit No. 2929 in this case. The issue presented by his cross-complaint is ownership of a water right, and on this issue the holding of a permit from the state engineer, in and of itself, has no probative force. A permit from the state engineer is not a water right, and this court has held that it is not an appropriation of the public waters of the state and is not real property. (*Speer v. Stephenson*, 16 Ida. 707, p. 716, 102 Pac. 365; *Ada County Farmers' Irr. Co. v. Farmers' Canal Co.*, 5 Ida. 793, 51 Pac. 990, 40 L. R. A. 485.) A permit merely expresses the consent of the state that the holder may acquire a water right, and if the holder of the permit substantially complies with all the requirements of the statute, to and including the actual application of the water to the beneficial use specified in the application for the permit, he may become the owner of a water right, the priority of which will relate back to the date of the permit; but until all the requirements have been complied with, including the actual application of the water, the holder of the permit has nothing but an inchoate right. Proof of ownership of a permit will not sustain a decree founded upon a pleading alleging ownership of water. After the holder of a permit has fulfilled all the requirements of the statute, and made proof to the state engineer that he has put the water to beneficial use for which the diversion was intended, he is entitled to a license from the state engineer confirming such use.

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(Sec. 3261, Rev. Codes.) Under the provisions of sec. 3262, such license is *prima facie* evidence of a water right, but no certificate issued by the state engineer prior to the issuance of such license is made *prima facie* evidence of a water right.

In the case of *Washington State Sugar Co. v. Goodrich*, 27 Ida. 26, at p. 38, 147 Pac. 1073, 1077, this court said: "The granting by the state engineer of a permit for the right to use of water of this state, in and of itself secures to the applicant no right to the use of the waters applied for in said permit, unless there be a substantial compliance with each and every provision of the statute relating to or in any manner affecting the issuance of such permit, and a fulfilment of the conditions and limitations therein, but a compliance with the conditions and limitations prescribed in such permit initiates a right to the use of the water in the applicant, and said right then becomes a vested one and dates back to the issuance of said permit."

By granting respondents a decree to 15 second-feet of water, dating from April 11, 1907, the court seems to have been of the opinion that respondents were entitled to the benefit of the doctrine of relation, and that their right for the full amount of water which their works were capable of diverting would date from the time of the application for the permit. We do not think that the respondents in this case were entitled to the benefit of the doctrine of relation. The first statute passed in Idaho Territory relating to water rights was enacted Feb. 10, 1881. This was followed by the act of Feb. 25, 1899. From the time of the passage of the act of Feb. 10, 1881, to the act of March 11, 1903, there was in force in Idaho a statute requiring notice to be posted and recorded by those who desire to initiate a claim for water or water rights, and requiring diligence on the part of the claimants in order that the doctrine of relation might be invoked for their benefit. Both the acts of 1881 and 1899 provided that by completion of works was meant the conducting of water to the place of intended use, and they further provided that by compliance with the rules prescribed in the statutes the claimant's right to use the water would relate back to the time the notice

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was posted. Both acts also provided that failure to comply with such rules deprived the claimants of the right to the use of the water as against a subsequent claimant who complied therewith, with a single exception, namely, that all ditches, canals or other works which had been made and constructed prior to the passage of the acts, by means of which the water of any stream had been diverted and applied to a beneficial use, must be taken to have secured the right to the water claimed to the extent of the quantity which said works were capable of conducting and not exceeding the quantity claimed, without regard to or compliance with the requirements of the statute.

In the face of these statutes no one was entitled to invoke the doctrine of relation who failed to comply with the requirements of the statute, with the exception above stated. (2 Kinney on Irrigation & Water Rights, p. 1299; *Pyke v. Burnside*, 8 Ida. 487, 69 Pac. 477; *Crane Falls Power & Irrigation Co. v. Snake River Irrigation Co.*, 24 Ida. 63, 133 Pac. 655.) The act of 1903 prescribed certain limitations in the matter of diligence in the prosecution of the work and provided that application to a beneficial use was necessary to complete the appropriation of public waters of the state. ¶ The doctrine of relation cannot be invoked by a person alleging title to a water right, and asking that his title be quieted, until the final consummation of the appropriation as defined by statute, and can be invoked only to the extent of the completion of the appropriation. ¶ (2 Kinney on Irrigation & Water Rights, p. 1290; *Bennett v. Nourse*, 22 Ida. 249, 125 Pac. 1038; *Cole v. Logan*, 24 Or. 304, 33 Pac. 568.) Under the acts of 1881 and 1899, the appropriation was completed upon the completion of the irrigation works and conducting of the water through the same to the point of intended use, and to the extent of the carrying capacity of the works, subject, however, to its being lost by failure to apply the water to a beneficial use within a reasonable time. Under the law of 1903, no appropriation is complete until the water has been applied to a beneficial use, and it follows that no appropriation can exceed the amount of water so applied.

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It is clear that under the cross-complaints in this action any decree to the respondents must be based upon the amount of water actually diverted and applied to a beneficial use. (*Pyke v. Burnside, supra.*) It seems that no objection was offered to the action of the court in grouping the rights of all respondents and so decreeing the water. There was testimony to the effect that at the time of the commencement of the suit, or at least at the time of the diversion of water by appellant company, respondents had under cultivation 240 acres of land, and 60 acres additional ready for cultivation. There was some testimony to the effect that an inch of water per acre was necessary to the proper irrigation of such land. Under the most favorable view of the evidence, respondent could not be entitled to a decree for more than six second-feet. The decree awarding respondent E. K. Taylor, and intervenors Samantha J. Taylor and J. B. Taylor, 15 second-feet of the waters of Dry Creek, with date of priority as of April 11, 1907, is erroneous and not sustained by the evidence.

The appellant Blaine County Irrigation Company sets out the permit of the state engineer under which it is operating. Appellant claims that by diverting the waters of Dry Creek at the point of intake of its pipe-line, a great saving of water is made; that between the intake of the pipe-line and the outlet of the Farmers' Ditch, where it formerly emptied into Wet Creek, there was a loss of about sixty per cent of the water flowing down Dry Creek and through the Farmers' Ditch, and that having effected this saving they were entitled to the same. The evidence showed that more than fifty per cent of the loss occurred in the Farmers' Ditch and about ten per cent in the creek itself. It appears that the farmers taking water through the Farmers' Ditch had their water measured to them at a point near where it was discharged from the ditch into Wet Creek. The decree of the court in 1907 did not designate the point at which their water should be measured. This court has held that water appropriated for irrigation purposes must be measured to the claimant at the point of diversion. (*Stickney v. Hanrahan*, 7 Ida. 424, 63 Pac. 189; *Bennett v. Nourse, supra.*) It may be that the decree of 22

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second-feet of water to the farmers is not a final limitation of their rights to 22 second-feet at the point of diversion from Dry Creek, but in the absence of a modification of that decree we do not think the court would be justified in holding that they would be entitled to divert more than 22 second-feet. Moreover, appellant company has not shown itself in position to insist on this point. The evidence fails to show that the appellant company has made a beneficial use of this water, or is in a position to do so, the evidence merely showing that this company has diverted water from Dry Creek. In order for appellant company to maintain its action for an injunction under its permit, it must not only show a substantial compliance with all the requirements of the statute, but also that it is in a position to apply the water it diverts to a beneficial use. (*Sandpoint Water etc. Co. v. Panhandle Dev. Co.*, 11 Ida. 405, 83 Pac. 347.)

The question of the rights of the respondents and appellant irrigation company, under their respective permits, in case title thereto is shown is not before the court under the pleadings in this case. Under proper allegations, actions may be instituted for the protection of rights initiated by permits.

In this action appellants also ask that the right of those taking water through the Farmers' Ditch to change their point of diversion be confirmed. Under the statute their point of diversion may be changed, provided such change causes no injury to any other appropriator of water. Respondents are the only parties who could claim to be injured in this case. Their rights must be determined in this action, and when so determined must be protected. A sufficient amount of water must be permitted to flow down the creek to the point of diversion of respondents to satisfy their rights according to their respective priorities. Subject to rights of respondents, the appellants are entitled to change their point of diversion.

The decree of the trial court must be reversed and a new trial ordered. No costs awarded on this appeal.

Morgan, J., concurs.

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BUDGE, C. J., Dissenting.—I am unable to concur in that portion of the opinion which holds that under the evidence, respondent, E. K. Taylor, has not shown any right to operate under permit No. 2929. No one claiming under this permit has disputed Taylor's right thereunder, and the undisputed testimony of Taylor is to the effect that he purchased rights under this permit; that the deed conveying the same was made out and placed in escrow, to be delivered upon the completion of Taylor's payment therefor, to his grantor; that he completed all the payments, but that upon demanding the deed in escrow it could not be found, and that by mutual agreement the rights which Taylor had purchased from his grantor were conveyed directly from Taylor's grantor to Taylor's grantee, reserving therefrom certain rights to Taylor under the permit. Taylor's evidence is corroborated by the transfer from Ben E. Hervey to the Spokane Irrigation & Power Company, Limited, "saving and excepting a sufficient quantity of said water and water rights to irrigate 1,920 acres of land heretofore expressly reserved and granted unto E. K. Taylor." While it is true that this language is merely descriptive of the reservation and does not constitute a grant to Taylor, it is evidence clearly corroborating Taylor's statement that a grant had theretofore been made to Taylor.

This entire action is equitable in its nature, and it is one of the fundamental maxims of equity that equity regards that as done which ought to be done. (1 Pom. Eq. Jur., 3d ed., secs. 363-377, inclusive, and numerous cases there cited.) The facts and circumstances in evidence touching Taylor's right under Permit No. 2929 lead to but one conclusion, that is, that E. K. Taylor ought to have been granted a right to operate under Permit No. 2929, and in equity this right is as complete as though the grant were actually made in form. All persons claiming under Permit No. 2929 concede Taylor's interest and rights thereunder. No one else has a right to complain, and his rights under the permit can only be questioned for noncompliance with the law thereunder, and while it is true that the lands described in Permit No. 2929 cover only a portion of the Taylor lands, the certificate of completion

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of the works issued by the state engineer to Taylor clearly describes all of the lands of the Taylors. The fact that all of the Taylors' lands were not clearly described in the permit, or, in other words, the fact that they actually applied the water to lands different than those described in the permit would be immaterial. (*Mahoney v. Neiswanger*, 6 Ida. 750, 59 Pac. 561.) Under the statute the state engineer has authority to grant a certificate of completion of works for lands different from those described in the permit. The state engineer is a public officer, and the presumption is that his acts, within the line of his duties, are regular, and in the absence of any showing that the permit had been amended, the presumption is that all of the regular steps have been complied with.

Nor is it correct to say that the permit in and of itself has no probative force. True, a permit is not a water right, but it does give any lawful holder of the permit, or an interest thereunder, the right to proceed with reasonable diligence and in compliance with the statute to mature the water right. To hold that a permit has no probative force would be tantamount, when pursued to its logical result, to holding that a person could get no rights under the statute which any appropriator would be bound to respect until the holder of the permit was in position to show that he had fully complied with the law in every respect and completed his appropriation by applying it to a beneficial use. (*Sandpoint Water etc. Co. v. Panhandle Dev. Co.*, 11 Ida. 405, 83 Pac. 347; *Speer v. Stephenson*, 16 Ida. 707-716, 102 Pac. 365; *Washington State Sugar Co. v. Goodrich*, 27 Ida. 26, 147 Pac. 1073.)

The evidence touching the rights of the Taylors and their use of water and the relation existing between E. K. Taylor on the one hand and Samantha J. and J. B. Taylor on the other hand, and the pleadings in this respect appear to be incomplete. The pleadings should be amended to promote the ends of justice in this case in order that the trial court may receive evidence in support of their respective claims and award a judgment in proper form, which would adequately protect the rights of the parties under the law and the facts.

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Independently of the discussion touching Taylor's rights under Permit No. 2929, I am of the opinion, under the facts of this case, that the appropriation of the Taylors should be found to be complete to the right to the use of all of the unappropriated water flowing in Dry Creek, to the capacity of their ditch, not theretofore appropriated by the individual plaintiffs, for the reason that the evidence conclusively shows that the Taylors had constructed their ditch of sufficient size and capacity to carry all of the unappropriated water, and had actually diverted the same and delivered it to the point of intended use, some time during the season of 1908, and a long time prior to the date of the permit held by the Blaine County Irrigation Company. And I think the evidence bears out the statement that the Blaine County Irrigation Company intended to secure its supply of water from flood waters, to be by it conserved in a reservoir for sale and distribution. The completion of the ditch by the Taylors and the diverting of the water to the point of intended use vested in them a property right in the use of the water, which could only be divested by condemnation for a higher use or lost by abandonment. To permit them to be deprived of such a vested property right in any other manner would clearly violate the constitution and laws of this state.

It is not necessary for an appropriator to follow the procedure provided by statute in order to acquire a valid water right which will be good as against all subsequent appropriators. One who actually diverts and appropriates water to a beneficial use or appropriates and diverts water to the point of intended use and thereafter, with reasonable diligence, applies such water to a beneficial use, acquires as good a right thereto as one who appropriates under the provisions of the statute. (*Conant v. Jones*, 3 Ida. 606, 32 Pac. 250; *Brown v. Newell*, 12 Ida. 166, 85 Pac. 385; *Lockwood v. Freeman*, 15 Ida. 395, 98 Pac. 295; *Nielson v. Parker*, 19 Ida. 727, 115 Pac. 488.)

In the latter case the court said: "It has never been the intention, so far as we are advised, of the legislature to cut off the right an appropriator and user of water may acquire

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by the actual diversion of the water and its application to a beneficial use. This constitutes actual notice to every intending appropriator of the water of such a stream. It is like a man being actually in possession of realty; indeed, a water right is realty in this state (sec. 3656, Rev. Codes; *Ada County Farmers' Irr. Co. v. Farmers Canal Co.*, 5 Ida. 793, 51 Pac. 990, 40 L. R. A. 485; *McGinness v. Stanfield*, 6 Ida. 372, 55 Pac. 1020), . . . but if he should actually divert the water and apply it to a beneficial use before the rights or interest of any other person intervenes, he would be entitled to the protection of the law in the use and enjoyment of the right thus acquired. He would then be in actual possession of the property to the extent of the diversion and use, and to that extent would need no protection from a constructive notice which a compliance with the statute affords."

It is clear, then, that there are two distinct methods by which one may acquire a water right; first, by actual appropriation; second, by compliance with the statute. The difficulty seems to arise in determining just how or in what manner and to what extent, in a given case, the rights of one claiming by actual appropriation have accrued and will be protected. In this case the Taylors went into possession of their land in the spring of 1908; during that season they completed the construction of their ditch, or canal, and actually diverted the water and carried it to the point of intended use, and the evidence shows that they proceeded, with due diligence, to clear their land, to cultivate it and to apply the water to a beneficial use thereon.

If I understand the majority opinion, it restricts the doctrine of relation to the extent of a compliance with the statute, which would be correct if the statutory method were the only method whereby water could be appropriated. But there is another doctrine, well settled in this state and other jurisdictions where the same question has arisen, which is adequate to fully protect the rights of the Taylors in all of the water which they claim, and this is the well-known doctrine of appropriation for future needs. (Wiel on Water Rights, 3d ed., vol. 1, sec. 396, and secs. 483, 484.) This author says,

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in sec. 483: "But while in mining a fixed amount may usually be sufficient from the start for all purposes, in irrigation of newly settled land it will not. The need for water grows as the area cultivated grows. The settler can cultivate, perhaps, only a few acres the first year; but he does everything with a view to later expansion. As is said in one case, it is reasonable to suppose that reclamation of the entire area owned at the time of diversion is contemplated. (Citing *Seaweed v. Pacific Livestock Co.*, 49 Or. 157, 88 Pac. 963.) Before his larger acreage is cleared and planted, however (which may take several years), other claimants to the use of the water have arrived. Does the law allow the former to continue increasing his use in the face of these later claimants?

"It seems well settled that such is the rule The essence of the rule is that the design may be carried out in spite of an intervening appropriator elsewhere on the stream, as the quotations below show."

In support of this doctrine the author cites cases from Colorado, Idaho, Montana, Nevada, Oregon, Utah, Washington and California. The only limitations upon the rule are that the future needed amount must have been originally claimed at the time of initiating the appropriation, the future needs must have been in mind, the enlarged use must have been a part of an original policy of expansion, use on the land in question must have been contemplated at the time of the original appropriation, the future enlargement cannot exceed the original capacity of the ditch, the amount actually diverted can be held without using no longer than is reasonable under the circumstances of each case, and the right may be lost by abandonment. What is a reasonable time is a question of fact in each case and depends upon the magnitude of the undertaking and the natural obstacles to be encountered in execution of the design. Sec. 484, *supra*, containing illustrations from numerous authorities there cited.

This court clearly and without ambiguity adopted the above rule in this state in *Conant v. Jones*, *supra*. Under the circumstances in this case I feel justified in quoting at length

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from the opinion in *Conant v. Jones*, that portion which is particularly in point, as follows:

“It is contended that respondent has not used, or put to a beneficial use all of the water of said creek, and for that reason he has forfeited his right to all of the water not used for the purpose intended. It is true that the evidence fails to show that respondent has utilized the entire amount of water diverted. There is no question but what respondent had the right to appropriate, of unappropriated water, sufficient, not only for the present, but also for the future needs of his land, when he shall get it into cultivation.

“The question arises as to the diligence to be exercised in the application of the water to the intended use. Section 3161 of the Revised Statutes of 1887 declares the diligence necessary to be exercised in conducting water to the point of intended use after the location of the same; but the law is silent as to the diligence to be exercised in making application of the water appropriated.

“The appropriator would no doubt be entitled to a reasonable time in which to get his land in cultivation and to make such application. If that be true, it follows that what constitutes reasonable time is a question of fact dependent upon the circumstances of each particular case. No inflexible rule should be made to decide what constitutes a reasonable time in this matter. We are of the opinion that a person who complies with the law as to locating and conducting the water to the point of intended use has such time as he may need, or require, using ordinary diligence in getting his land into cultivation, to make application of such water to the intended use, such time at least, as is reasonable under all of the circumstances.

“Poor men as a rule have settled upon the arid lands of this state and taken them under the laws of Congress, many of them under the homestead law, and are able to clear but a small portion of such lands of sagebrush, from year to year, and put it in condition for raising a crop, and it will take years for many of them to prepare their entire farms for cultivation and to make application of the water appropriated

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thereto. A decision that would defeat persons acting in good faith and using reasonable diligence from securing the full benefit of the water appropriated would be most unjust and inequitable. In the meantime, however, he is only entitled to such water from year to year as he puts to a beneficial use. A person may add from year to year acreage to his cultivated land, and increase his application of water thereto for irrigation as his necessities may demand, as his abilities permit, until he has put to a beneficial use the entire amount of water at first diverted by him and conducted to the point of intended use."

The rule there laid down has been followed by this court in *Hall v. Blackman*, 8 Ida. 272, 68 Pac. 19; *Brown v. Newell*, *supra*. It should be noted in connection with the latter case that it was decided in 1906, three years after the adoption of the statute providing for the issuance of permits and the ultimate maturing of water rights thereunder by complying with the statutory provisions. The facts in that case are substantially parallel with the facts in the case at bar, so far as they describe the acts and intention of the Taylors. The court says, in its opinion:

"It is contended by appellant that the acts of diversion and appropriation done by Horton in 1899 did not amount to an actual appropriation. It clearly appears from the evidence that the ditch was opened in the fall of 1899, and the head-gate was put in and the water, to the amount of 200 inches, was actually delivered on the Horton claim. These acts were followed up the next year by extending the ditch so as to more completely distribute the water over the entire claim, and this in turn was followed by cultivation of a larger acreage of the claim. We think the facts bring this case within the well-established rules of law both as to what constitutes an appropriation as well as the reasonable time in which an appropriator may apply the water to the intended use. (*Conant v. Jones*, 3 Ida. 606, 32 Pac. 250; *Pyke v. Burnside*, 8 Ida. 487, 69 Pac. 477; *Sandpoint Water & Light Co. v. Panhandle Dev. Co.*, 11 Ida. 405, 83 Pac. 347.)

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“ It is unnecessary for us to consider the validity of the water right notice and claim posted by Horton on March 28, 1900, or of the subsequent steps taken by him under that notice in his endeavor to comply with the law. The actual diversion and application of the water had preceded that date, and it therefore becomes unnecessary for us to consider the steps taken in regard to the posting and recording the notice and the prosecution of work thereafter.”

The facts in the present case are sufficient to indicate the amount of land settled and occupied by the Taylors, which, from the evidence, it clearly appears they intended to reclaim and irrigate by the application of water, which was actually appropriated and diverted to the point of intended use sometime during the season of 1908. The evidence shows that the ditch was designed to carry the water from their point of diversion to and upon their lands, and that it was completed that season, and that its capacity was adequate to carry water sufficient for the irrigation of all of the lands in question. The evidence further shows that the Taylors have proceeded with reasonable diligence in the application of this water upon their land to a beneficial use in the reclamation thereof. Of all of these facts the Blaine County Irrigation Company had actual notice at the time it secured its permit from the state engineer in October, 1910.

All of the facts and circumstances in evidence clearly show that the Taylors have brought themselves well within the rule governing appropriation for future needs. To hold otherwise would amount to overruling a long line of harmonious decisions governing such property rights in this state and would abrogate a rule of law which is well settled in all of the arid states.

For the reasons herein expressed I am unable to concur in the majority opinion upon this phase of the case.

Argument for Appellant.

(April 3, 1917.)

SAMUEL IRETON and ALEXANDER IRETON, Respondents, v. IDAHO IRRIGATION COMPANY, LIMITED, a Corporation, Appellant.

[164 Pac. 687.]

IRRIGATION AND WATER RIGHTS — REAL PROPERTY — LIENS AND MORTGAGES—PRIORITY.

Where a Carey Act construction company enters into a contract with a desert land entryman, whereby it furnishes water to him which is based upon, and the right to the use of which becomes appurtenant to, the land, and issues to him shares of stock in an operating company which it is intended shall ultimately become the owner of the irrigation system, and retains possession of the shares as security for the payments to be made therefor, but does not record the contract, and the entryman afterward mortgages the land to a third party who, without actual notice of any lien or claim of the construction company, acquires such mortgage and records it, the lien created by the mortgage attaches to the water right and to the shares of stock, and is superior to the lien or claim of the construction company.

[As to mortgage as "security," see note in *Ann. Cas.* 1914D, 625.]

APPEAL from the District Court of the Fourth Judicial District, for Gooding County. Hon. James R. Bothwell, Judge.

Action to foreclose real estate mortgage. Judgment for plaintiffs. *Affirmed.*

Oppenheim & Hodgkin and Longley & Walters, for Appellant.

Carey Act operating companies are mutual irrigation companies, and each share of stock represents the interest that the holder thereof has in such corporation. (*Hobbs v. Twin Falls Canal Co.*, 24 Ida. 380, 133 Pac. 899.)

Certificates of stock are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation of which he is a member. (4 Thompson on Corp., 2d ed., secs. 3455-3465.)

Argument for Respondents.

Shares of stock in an irrigation company are personal property under sec. 2747, Rev. Codes. (*Watson v. Molden*, 10 Ida. 570, 79 Pac. 503.)

Shares of stock in an irrigation company are not appurtenant to the land owned by the owner of such shares. (*Wells v. Price*, 6 Ida. 490, 56 Pac. 266.)

The settlers' contract is in the nature of a conditional sale, and the title to the water does not become vested in the entryman until the purchase price thereof is paid. (*Bennett v. Twin Falls North Side Land & Water Co.*, 27 Ida. 643, 150 Pac. 336.)

Where a transaction gives one party inequitable advantage over the other, equity will often interfere in behalf of the injured party, and equity has at times impressed liens in absence of expressed contract, and contrary to the rules of law. (*Clapp v. Maurer*, 94 Kan. 549, 146 Pac. 1156.)

Richards & Haga, McKeen F. Morrow and Marvin C. Hix, for Respondents.

Water rights sold by a Carey Act construction company are not personal property, for they "embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto." (Sec. 1615, Rev. Codes; *State v. Twin Falls Canal Co.*, 21 Ida. 410, 121 Pac. 1039; *State v. Twin Falls Canal Co.*, 27 Ida. 728, 151 Pac. 1013.)

The construction company serves only as a conduit for transferring the right to the use of water from the state to the settler, and the operating company is merely a trustee for the settlers and owners of the water rights, and the interest of the water user is realty, for it is an undivided and proportionate interest in the irrigation system, water rights and appropriations. (*Idaho Irrigation Co. v. Lincoln County*, 28 Ida. 98, 152 Pac. 1058; *Bennett v. Twin Falls North Side L. & W. Co.*, 27 Ida. 643, 150 Pac. 336; *Berg v. Yakima Valley Canal Co.*, 83 Wash. 451, 145 Pac. 619, L. R. A. 1915D, 292; *In re Estate of Thomas*, 147 Cal. 236, 81 Pac. 539.)

Argument for Respondents.

The nature of the water right acquired by a settler under a Carey Act project is determined by the statutes and not by the certificate of stock in the operating company. Such certificate is merely convenient evidence of the number of water rights or shares in the system owned by the settler. Upon the purchase of the water rights, they become appurtenant to the land, and the transfer of the land operates as a transfer of the water rights, and the possession of the stock certificates by one who does not own the land therein described and to which the water has been made appurtenant will not entitle the holder of such certificate to water thereunder for use upon other lands. (Kinney on Irrigation, 2d ed., sec. 1484; Wiel on Irrigation, 3d ed., sec. 1269.)

By the constitution, statutes and decisions of this state, even water rights outside of Carey Act projects are appurtenant to the lands to which the water is applied. (*Paddock v. Clark*, 22 Ida. 498, 126 Pac. 1053; *Russell v. Irish*, 20 Ida. 194, 118 Pac. 501; *Taylor v. Hulett*, 15 Ida. 265, 97 Pac. 37, 19 L. R. A., N. S., 535; *Hall v. Blackman*, 8 Ida. 272, 68 Pac. 19; *Stanislaus Water Co. v. Bachman*, 152 Cal. 718, 93 Pac. 858, 15 L. R. A., N. S., 359.)

Record title and possession constitute complete indicia of absolute ownership, and the law does not require a purchaser or encumbrancer to make further inquiry. (*Quick v. Milligan*, 108 Ind. 419, 58 Am. Rep. 49, 9 N. E. 392; *Blight v. Schneck*, 10 Pa. St. 285, 51 Am. Dec. 478; *Hubbard v. Greeley*, 84 Me. 340, 24 Atl. 799, 17 L. R. A. 511; 24 Am. & Eng. Enc. Law, 187; 34 Cyc. 614.)

When one of two innocent persons—that is, persons each guiltless of an intentional moral wrong—must suffer a loss, it must be borne by that one of them who by his conduct, acts or omissions has rendered the injury possible. (Pomeroy's Eq. Jur., 2d ed., sec. 803; *Quick v. Milligan*, *supra*; *Blight v. Schenck*, *supra*; *Hubbard v. Greeley*, *supra*; *Pennypacker v. Latimer*, 10 Ida. 618, 81 Pac. 55; *Schultz v. McLean*, 93 Cal. 329, 28 Pac. 1053; *Noble v. Moses*, 74 Ala. 604.)

MORGAN, J.—On December 21, 1911, Robert Lansdon and his wife executed and delivered their promissory note for \$2,000 to Boise Title & Trust Company, and, on the same day, to secure the payment thereof, executed and delivered to that company a mortgage upon 160 acres of land in Gooding county, together with any and all water rights owned by the mortgagors or belonging to or connected with the premises. The mortgage was duly recorded on January 8, 1912, and on March 13th of that year, and prior to the maturity of the note, was sold, and assigned, together with the indebtedness thereby secured, to respondents who have commenced this action to foreclose it.

Appellant, a Carey Act construction company, entered into a contract with the state of Idaho to construct an irrigation system in the counties of Blaine and Lincoln, out of a portion of which latter county the county of Gooding has been created, for the purpose of watering lands entered under the Carey Act. The contract provided that appellant should sell to entrymen water rights and shares of stock in the Big Wood River Reservoir & Canal Company, Limited, a corporation to be formed by it, in order to facilitate the transfer of the ownership and control of the system to purchasers of water rights and for their convenience, when they shall have acquired the system, in its management and control and in the distribution of water therefrom to their lands according to their respective interests. The shares were to represent a proportionate interest in the irrigation works, one share to be issued for each acre of land to be irrigated. The land in question was not Carey Act land, but was acquired by Lansdon under the desert land laws of the United States and is adjacent to the Carey Act segregation of appellant and capable of being irrigated only by its system.

On April 1, 1910, appellant and Lansdon entered into a written agreement, whereby the latter purchased a certain number of shares in the canal company, each share entitling him to one-eightieth cubic-foot of water per second and a proportionate interest in the system. The contract provided that in case of default in the payment of any instalment of

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the purchase price appellant might, at its option, declare all payments due, enforce any lien it might have upon the water right and land, or proceed to enforce any remedy given it by law. Lansdon and wife, by the terms of the contract, which was recorded on June 28, 1913, were to transfer, and did transfer, the stock to appellant as security for the payments to be made. In settlement of the first payment due the entryman gave his promissory note to appellant; he defaulted in the subsequent payments.

Neither respondents nor the Boise Title & Trust Company at the time they respectively acquired the mortgage or at any time prior thereto, had actual notice of any lien of appellant by reason of the entryman's contract and, as above stated, the mortgage was made and recorded long prior to the date of recording the contract.

Water was delivered to and applied to a beneficial use upon the land during 1911, and the right to the use of water therefor from the system of appellant has never been abandoned. Lansdon made final proof on December 12, 1911, and evidence of the water right, consisting of the contract between himself and appellant, formed part of the proof. Final certificate issued January 6, 1912, and patent July 6, 1914. The irrigation system has been practically completed, but is not yet accepted by the state nor have the works been turned over to the operating company.

The court rendered judgment in favor of respondents, decreeing that the lands, water right and shares of stock be sold and the proceeds applied, first, to the payment of the costs of sale; second, to the payment of the claim of respondents, and third, to the payment of the claims of appellant for the purchase price of the water right. This appeal is from the judgment.

The only issue presented in this case is as to the relative priority of the liens of the appellant and respondents upon the water right in question, it having been conceded by appellant that whatever lien it has upon the land, by virtue of its contract, is subsequent to the mortgage. It is contended by respondents, and denied by appellant, that the water right

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is real property, appurtenant to the land, and was conveyed by the mortgage.

Sec. 3056, Rev. Codes, includes water rights within the definition of real property. Such rights are appurtenant to the land to which the water represented thereby has been beneficially applied. (Sec. 4, art. 15, constitution; sec. 3240, Rev. Codes; *Hall v. Blackman*, 8 Ida. 272, 68 Pac. 19; *Taylor v. Hulett*, 15 Ida. 265, 97 Pac. 37, 19 L. R. A., N. S., 535; *Russell v. Irish*, 20 Ida. 194, 118 Pac. 501; *Paddock v. Clark*, 22 Ida. 498, 126 Pac. 1053.) Furthermore, by the terms of the contract between the state and appellant, and of that between appellant and Lansdon, the water right was dedicated, and made appurtenant to the land involved herein and none other.

Sec. 1629, Rev. Codes, being a part of the chapter of the Idaho law whereby the conditions of the Carey Act are accepted, provides that any person, company or association furnishing water for a tract of land shall have a prior lien upon the water right and land for all deferred payments for the same, and that the contract for the water right, upon which the lien is founded, shall be recorded in the office of the recorder of the county where this land is situated. While the land involved here was not a Carey Act entry, but was acquired under the desert land laws of the United States, the contract between appellant and Lansdon, the entryman, provided: "That the purchaser has made application to the company to purchase upon the terms hereinafter set forth, shares in the Big Wood River Reservoir and Canal Company, Limited, upon the same terms and conditions, as near as may be, as purchasers of water rights under the Carey Act." In that contract it was provided that Lansdon and his wife, for and in consideration of the premises and of the agreements and covenants of appellant, and as security only, by way of mortgage, for the payment, when due, of the sums agreed to be paid for the water rights did grant, bargain, sell, convey, assign, transfer and set over unto appellant, its successors and assigns, all their right, title and interest in and to the lands and premises described in the contract, and

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Lansdon also agreed that, to further secure said payment, the shares of stock purchased in the Big Wood River Reservoir & Canal Company, Limited, should be and they were thereby assigned and transferred to appellant.

It is apparent that under the terms of this contract appellant is in no better position than it would have been had the land been embraced within a Carey Act entry. By the terms of this contract the land, so far as it could be, and the water rights and certificates of stock were conveyed, or agreed to be conveyed, by way of mortgage, to secure the payment of the sums due to appellant from Lansdon, which makes the provisions of sec. 3160, Rev. Codes, applicable to it, as follows: "Every conveyance of real property other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded." Sec. 3161 defines the term "conveyance" to mean "every instrument in writing by which any estate or interest in real property is created, alienated, mortgaged or incumbered, or by which the title to any real property may be affected, except wills."

At the time the mortgage was given there was nothing on record in the office of the county recorder indicating that there was any lien whatever, either upon the land mortgaged or upon the water right appurtenant thereto, and the record of the case does not disclose that either the mortgagee or respondents had knowledge of any fact which would lead a prudent person to a discovery of the claims of appellant.

The fact that final proof was accepted was an indication that the entryman had obtained a water right which he could mortgage, for, under the provisions of the United States statutes relating to desert land entries, the government would not issue its patent until proof was made that a water right had been acquired by the entryman by purchase or otherwise. This fact and the fact that the mortgagor was actually using the water was sufficient, in the absence of a record or other information to the contrary, to invite the conclusion that the

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entryman, who had acquired title to the land, also had title to the water right appurtenant thereto.

Appellant sold this water right and permitted it to be applied to a beneficial use upon, and to become appurtenant to, the land in question. It failed and neglected to give notice of its claim to security, as by law provided, and cannot be heard to complain that the law recognizes as prior and superior the lien of an innocent mortgagee whose conveyance, though subsequent in point of date of execution, is first recorded.

It is contended by appellant that the shares of stock in the operating company are personal property, and that the water right passed by assignment of them and did not become subject to the mortgage on the land.

While shares of stock in an ordinary corporation, organized for profit, are personal property (sec. 2747, Rev. Codes; *State v. Dunlap*, 28 Ida. 784, and cases therein cited on page 802, 156 Pac. 1141), and while this court has held shares in an irrigation company to be personal property (*Watson v. Molden*, 10 Ida. 570, 79 Pac. 503), the fact must not be lost sight of that a water right is, as heretofore shown, real estate, and that in case of a mutual irrigation company, not organized for profit, but for the convenience of its members in the management of the irrigation system and in the distribution to them of water for use upon their lands in proportion to their respective interests, ownership of shares of stock in the corporation is but incidental to ownership of a water right. Such shares are muniments of title to the water right, are inseparable from it, and ownership of them passes with the title which they evidence. (*In re Thomas' Estate*, 147 Cal. 236, 81 Pac. 539; *Berg v. Yakima Valley Canal Co.*, 83 Wash. 451, 145 Pac. 619, L. R. A. 1915D, 292.)

It follows that since respondents' mortgage is a prior lien upon the land and upon the water right appurtenant thereto, their claim to the shares of stock, which evidence that water right, is superior to that of appellant.

The judgment appealed from is affirmed. Costs are awarded to respondents.

Budge, C. J., and Rice, J., concur.

Points Decided.

(April 3, 1917.)

**A. W. ATHEY, Respondent, v. OREGON SHORT LINE
RAILROAD COMPANY, a Corporation, Appellant.**

[165 Pac. 1116.]

APPEAL AND ERROR—PREMATURE APPEAL—EVIDENCE—ESTOPPEL—PUBLIC OFFICERS—APPEARANCE.

1. Under the existing statute an appeal from the district court to the supreme court, taken prior to the entry of the judgment in the judgment-book, does not confer jurisdiction upon the supreme court, and will be dismissed.

2. The transcript containing the record on appeal imports verity, and is the conclusive evidence of the proceedings in the lower court.

3. Any memorandum of the date of entry of judgment made by the clerk of the district court without authority of law has no standing as evidence of the date of entry of judgment.

4. The memorandum in the judgment docket of the date of the entry of judgment being the only record thereof provided by law, and the judgment docket entries not being properly part of the record on appeal, there is no authentic evidence of the date of entry of judgment in the record.

5. It is the statutory duty of the clerk of the district court to enter the judgment in the judgment-book and make up the judgment-roll prior to making the entries in the judgment docket, and when it appears that the entries in the judgment docket have been made a *prima facie* presumption arises that the clerk has done his duty and that the judgment has actually been entered in the judgment-book.

6. Neither the testimony of the clerk of the district court nor that of his deputy will be admissible to impeach the presumption of the regularity of their official acts; other evidence may be received for such purpose.

7. An appellate court can only derive its jurisdiction from the constitution and statutes of the state, and therefore, in the absence of actual fraud, there can be no estoppel to deny its jurisdiction.

8. A stipulation between the attorneys made during the time in which an appeal could properly have been taken, extending the time in which to file briefs, is not such an appearance as would confer jurisdiction upon the appellate court.

[As to validity and enforceability of stipulation between parties fixing venue of action in particular county, see note in *Ann. Cas.* 1912C, 815.]

Argument for Respondent.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Charles P. McCarthy, Judge.

Motion to dismiss on the ground that appeal was taken prematurely. *Motion sustained and appeal dismissed.*

H. B. Thompson and Karl Paine, for Appellant.

The record filed for the purpose of appeal imports absolute verity. (4 Corpus Juris, sec. 2242, p. 496; *In re Pichoir's Estate*, 139 Cal. 694, 70 Pac. 213, 215, 73 Pac. 604.)

The affidavits of counsel and the deputy clerk of the district court are no proper part of the record, will not be considered and will be stricken on motion. (*Williams v. Boise Basin Min. etc. Co.*, 11 Ida. 233, 81 Pac. 646; *In re Paige's Estate*, 12 Ida. 410, 86 Pac. 273; *Orange Growers' Bank v. Duncan*, 133 Cal. 254, 65 Pac. 469; *Johnston v. Callahan*, 146 Cal. 212, 79 Pac. 870.)

"An appellate court may obtain jurisdiction on appeal as well by voluntary appearance by an adverse party as by the service of a notice of appeal upon him." (*Bell v. San Francisco Sav. Union*, 153 Cal. 64, 94 Pac. 225; *Moore v. Kouibly*, 1 Ida. 55; *Planters' Trading Co. v. Moore*, 7 Ala. App. 393, 62 So. 302.)

V. P. Coffin and Harry Keyser, for Respondent.

The language of sec. 4807, Rev. Codes, using the term "entry of such judgment" refers to entry in the judgment-book as prescribed by sec. 4454 (*Durant v. Comegys*, 3 Ida. 67, 35 Am. St. 267, 26 Pac. 755); and since sec. 4807 says that the appeal may be taken within a given time *after* such entry, it has become the settled rule of all states having the same statutes that an appeal taken *before* such entry is premature, and will be dismissed on motion. (*McLaughlin v. Doherty*, 54 Cal. 519; *Thomas v. Anderson*, 55 Cal. 43; *Coon v. Grand Lodge*, 76 Cal. 354, 18 Pac. 384; *In re More's Estate*, 143 Cal. 493, 77 Pac. 407, and cases cited; *Hoffman-Bruner Granite Co. v. Stark*, 132 Iowa, 100, 108 N. W. 329; *Greenly v. Hopkins*, 7 S. D. 561, 64 N. W. 1128; *Vollmer v. Nez Perces County*, 7 Ida.

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302, 62 Pac. 925; *Sanitti v. Hartman*, 29 Ida. 490, 161 Pac. 249, and cases cited; *Yeomans v. Lamberton*, 29 Ida. 801, 162 Pac. 674.)

It is the duty of the appellant to see to it that the judgment is entered in the judgment-book before taking his appeal, and if the clerk neglects to enter the judgment as the law requires, either party who desires to have it entered can compel him to do so by writ of mandate. (*Oliver v. Kootenai County*, 13 Ida. 281, 284, 90 Pac. 107; *Sanitti v. Hartman*, *supra*.)

Anything inserted in the record gratuitously by the clerk without authority of law is not a record, nor any part of a record. If such notation is entitled to any consideration whatever as evidence, it is evidence only of that which the person who made it intended by it. (*In re Pearson's Estate*, 119 Cal. 27, 50 Pac. 929; *In re More's Estate*, 143 Cal. 493, 77 Pac. 407, 409.)

Stipulation cannot be allowed to confer jurisdiction upon the supreme court where the necessary jurisdictional facts do not exist. (*Penny v. Nez Perces County*, 4 Ida. 642, 43 Pac. 570; *Anderson v. Halthusen M. Co.*, 30 Utah, 31, 83 Pac. 560.)

The facts which give jurisdiction to the appellate court, and divest the jurisdiction of the trial court, as the fact that the appeal was taken within the statutory period, cannot be presumed, but must affirmatively appear upon the record. (*In re More's Estate*, *supra*.) The statutes limiting the time to appeal are jurisdictional and mandatory. (*Williams v. Long*, 130 Cal. 58, 80 Am. St. 68, 62 Pac. 264; *Estate of Brewer*, 156 Cal. 89, 103 Pac. 486; *Moe v. Harger*, 10 Ida. 194, 77 Pac. 645.)

RICE, J.—This action was brought in the district court of the third judicial district, in and for Ada county. The case was tried before a jury and a verdict in favor of the plaintiff was rendered on Feb. 10, 1916. The judgment was signed by the judge and filed with the clerk on February 11, 1916. On February 15, 1916, an appeal was taken and perfected. The matter comes up at this time on motion to dismiss the appeal.

The grounds for dismissal are that the appeal was taken prior to the actual entry of judgment in the judgment-book as required by sec. 4807, Rev. Codes, as amended by chap. 80, Sess. Laws, 1915. In support of his motion to dismiss the appeal, the respondent has filed three affidavits of Thomas E. Powell, deputy clerk of the district court; also the affidavit of V. P. Coffin, attorney for respondent. In opposition to this motion the appellant has filed the affidavit of Karl Paine, an attorney for appellant; also affidavits of Otto F. Peterson and Cleo J. Schooler, senior deputy and deputy clerk of the district court.

Appellant does not admit that the judgment was entered subsequent to the appeal, and relies upon the entry in the judgment docket in the office of the clerk of the district court and upon the certified copy of the record of the judgment in the judgment-book, which contains the following notation: "Entered February 11, 1916."

It must be taken as settled law in this state that an appeal taken prior to actual entry of the judgment in the judgment-book must be dismissed. (*Vollmer v. Nez Perces County*, 7 Ida. 302, 62 Pac. 925; *Santti v. Hartman*, 29 Ida. 490, 161 Pac. 249; *Yeomans v. Lamberton*, 29 Ida. 801, 162 Pac. 674.)

The transcript containing the record filed for the purpose of appeal imports absolute verity. It is the sole, conclusive and unimpeachable evidence of the proceedings in the lower court. (*Oklahoma Fire Ins. Co. v. Kimpel*, 39 Okl. 339, 135 Pac. 6; 4 Corpus Juris, 512.)

The question that concerns us here is not only the fact of the date of entry of judgment, but also the proper evidence of that fact. What constitutes the record on appeal from a final judgment is determined by Rev. Codes, sec. 4818, as amended 1911 Sess. Laws, p. 375, and sec. 4456, as amended 1909 Sess. Laws, p. 76. The law nowhere seems to provide for the authentic date of entry of judgment appearing upon any of the papers specified in these sections as constituting the record on appeal. Therefore, any date appearing thereon purporting to be the date of entry of judgment is without authority of law, and has no standing as evidence of that date.

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The law does, however, provide that the clerk must make the proper entries in the judgment docket, among which is specified the date of entry of the judgment. (Rev. Codes, sec. 4457, as amended Sess. Laws 1913, p. 91, and sec. 4458.) The law does not provide that entries upon the judgment docket shall constitute any part of the record on appeal. Records and papers improperly included in a judgment-roll on appeal will be stricken on motion. (*Williams v. Boise Basin Mining etc. Co.*, 11 Ida. 233, 81 Pac. 646.)

Sections 4450, 4454, 4456 (amended 1909 Sess. Laws, p. 76), 4457 (amended 1913 Sess. Laws, p. 91), 4458 and 4459, Rev. Codes, determine the statutory duty of the clerk after rendition of a judgment or verdict. From these sections it appears that after a judgment or verdict is rendered and filed, the clerk's first duty is to enter the judgment at length in the judgment-book. Immediately after entry in the judgment-book it is his duty to fasten together papers constituting the judgment-roll. Immediately after making up the judgment-roll it is his duty to make proper entry in the judgment docket. When the entry in the judgment docket is made prior to the appeal, it will be presumed that the clerk has done his duty and judgment has been entered prior thereto, and the jurisdiction of the appellate court will be presumed. (*Smith v. Hawley*, 11 S. D. 399, 78 N. W. 355.) This, however, is only *prima facie* presumption, and may be overthrown by the proper evidence. (*Smith v. Hawley*, *supra*.)

When the jurisdiction of the appellate court is attacked, the question as to what is proper evidence of the fact of jurisdiction is for this court to consider. We have on the one hand an official entry in the judgment docket of the clerk to the effect that judgment was entered on Feb. 11, 1916. On the other hand we have the affidavit of the deputy to the effect that judgment was not entered before Nov. 2, 1916.

It has been held in this state that the evidence of a notary public is incompetent and inadmissible to impeach his own certificate of acknowledgment. (*Wilson v. Wilson*, 6 Ida. 597, 57 Pac. 708.) Upon the same theory the affidavits of the clerk of the district court, and his deputies, are incompetent

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and inadmissible to impeach the regularity of their official acts. However, as the evidence of anyone other than the notary who made the certificate is admissible to impeach its verity, so is the evidence of anyone other than the clerk of the district court, or his deputies, competent and admissible to impeach the presumption of the regularity of the official acts of the clerk.

This rule is in no way in conflict with the rule that the record filed for the purpose of appeal imports absolute verity. The record on appeal, as has been shown, is not questioned. The only attack that has been made is upon the *prima facie* presumption that the judgment was entered prior to the time of taking the appeal. The affidavit of V. P. Coffin, being direct and certain to the effect that the judgment was not entered before Nov. 2, 1916, and being undisputed, must be received as the best evidence of the actual date of the entry of judgment in the lower court.

It has been argued by appellant that the respondent in this case is estopped to deny jurisdiction of the court on the ground that his conduct was fraudulent, in that it led the appellant to believe that the appeal was taken subsequent to the entry of judgment. This view cannot be sustained by the evidence. The attorney for the respondent was under no duty to the appellant to inform it of the date of the actual entry of the judgment. The notation of the date of the entry of judgment made in the judgment-book was not made on the suggestion of the respondent, or his attorney, but was made according to the usages and custom of the deputy clerk of the district court. It appears that the notation in the judgment book that judgment was entered Feb. 11, 1916, misled the attorneys for appellant, but it does not appear that the respondent, or his attorneys, were in any way responsible for that entry being made.

An appellate court can only derive its jurisdiction from the constitution and statutes of the state. (*Penny v. Nez Perces County*, 4 Ida. 642, 43 Pac. 570; *People v. Walker*, 132 Cal. 137, 64 Pac. 133; *Estate of Campbell*, 141 Cal. 72, 74 Pac. 550; *Brooks v. Calderwood*, 19 Cal. 124, 125.) Where a stat-

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ute requires an appeal to be taken after entry of judgment, an appeal prior to entry of judgment will be dismissed as the court has no jurisdiction to consider the same. (*Sanetti v. Hartman, supra*; *Yeomans v. Lamberton, supra*.) The fact that the aggrieved party has no other remedy is immaterial. (*Maxon v. Gates*, 118 Wis. 238, 95 N. W. 92.) Where the court otherwise is without jurisdiction, jurisdiction cannot be conferred by stipulation. (*Chamberlain v. Hedger*, 10 S. D. 290, 73 N. W. 75.) The acknowledgment of *due service* on a certain date does not waive the defect that the service was too late for the purposes of the appeal. (*Towdy v. Ellis*, 22 Cal. 650, 651.) A respondent will not be estopped to deny jurisdiction of the court by his act of indorsing an admission of service of the notice of appeal. The acts of the parties cannot confer jurisdiction on the court in a case withheld by the law from its jurisdiction. (*Estate of Brewer*, 156 Cal. 89, 103 Pac. 486.)

Appellant further contends that the respondent having entered into stipulation for further time in which to file his brief in this case within the time that an appeal could lawfully be taken to this court, such stipulation was an appearance and that where there is voluntary appearance no service of notice of appeal is necessary. It has been held that a stipulation entered into between parties is not such an appearance as will confer jurisdiction upon the court. (*Washington County Land & Development Co. v. Weiser Nat. Bank*, 26 Ida. 717, 146 Pac. 116.)

It appearing that this appeal was taken prior to the actual entry of judgment, and it being the law that an appeal taken prior to the entry of judgment confers no jurisdiction on this court, this appeal must be dismissed. Costs awarded to respondent.

Morgan, J., concurs.

Budge, C. J., sat at the hearing, but took no part in the decision.

Petition for rehearing denied.

Opinion of the Court—Budge, C. J.

(April 11, 1917.)

JOHN WALSH, Respondent, v. A. H. NIESS and UTAIDA
ROD AND GUN CLUB, a Corporation, Appellants.

[164 Pac. 528.]

APPEAL—ABSENCE OF CERTIFICATE TO TRANSCRIPT—DISMISSAL BY COURT.

Held, where the transcript or record on appeal from an order or contested motion does not contain a certificate that the papers therein contained constitute all the records, papers and files used or considered by the judge making the order on the hearing of the motion, as required by sec. 4821, Rev. Codes, and rule 24 of this court, the appeal will be dismissed under rule 27 of this court, on the court's own motion.

APPEAL from the District Court of the Ninth Judicial District, for Fremont County. Hon. James G. Gwinn, Judge.

Action to recover wages. From a judgment for plaintiff, defendant appeals. *Dismissed*.

N. D. Jackson and A. H. Wilkie, for Respondent.

A. H. McConnell, for Appellants.

Counsel cite no authorities on point decided.

BUDGE, C. J.—This is an appeal from an order dissolving an injunction and from an order denying a motion to set aside a default.

Upon an examination of the transcript we find that it contains no certificate, that the papers therein constitute all the records, papers and files used or considered by the judge on the hearing.

Sec. 4819, Rev. Codes, provides, that: "On appeal . . . from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, . . . order appealed from, and of papers used on hearing in the court below."

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Sec. 4821, Rev. Codes provides: "The copies provided for in the last three sections must be certified to be correct by the clerk or the attorneys. . . . "

Rule 24 of this court requires a certificate to the transcript signed by the judge, clerk or attorneys and prescribes the form and the contents of such certificate. No such certificate appears in this transcript.

Rule 27 of this court, provides: "A strict compliance with the requirements of the rules concerning the preparation of transcripts will be exacted of the appellant or plaintiff in error in all cases by the Court, whether objection be made by the opposite party or not, and for any violation or neglect in these respects which is found to obstruct the examination of the record, the appeal may be dismissed "

The effect of the absence of the certificate that the transcript is required to contain, showing that the papers and records contained therein were all of the papers used by the trial judge on the hearing, has recently been considered by this court in the case of *Dudacek v. Vaught*, 28 Ida. 442, 154 Pac. 995. It is unnecessary to again review the authorities at length; the appeal will be dismissed. (*Simmons Hardware Co. v. Alturas Com. Co.*, 4 Ida. 386, 39 Pac. 553; *Village of Sand Point v. Doyle*, 9 Ida. 236, 74 Pac. 861; *Knutsen v. Phillips*, 16 Ida. 267, 101 Pac. 596; *Steve v. Bonners Ferry Lumber Co.*, 13 Ida. 384, 92 Pac. 363; *Doust v. Rocky Mountain Bell Tel. Co.*, 14 Ida. 677-679, 95 Pac. 209; *Johnston v. Bronson*, 19 Ida. 499, 114 Pac. 6; *Dudacek v. Vaught*, *supra*.)

The appeal is dismissed. Costs awarded to respondent.

Morgan and Rice, JJ., concur.

Argument for Appellants.

(April 19, 1917.)

G. A. PARKER and F. S. MARSHALL, Appellants, v. I. A. HERRON, Respondent.

[164 Pac. 1013.]

FRAUD—SCIENTER—EVIDENCE.

1. The evidence in this case examined and *held* to be insufficient to sustain the allegations of the answer wherein fraud is charged.

2. In order to establish fraud in a case of this kind it must be shown in addition to falsity of representations of a material fact, or facts, upon which the party to whom they were made innocently acted to his injury, that the party making them knew them to be false or that he made them recklessly, without knowledge of their truth or falsity.

[As to what is sufficient proof of fraud, see note in 65 Am. Dec. 157.]

APPEAL from the District Court of the Fourth Judicial District, for Twin Falls County. Hon. Chas. O. Stockslager, Judge.

Action upon promissory notes. Judgment for plaintiffs in the sum of one dollar; they appeal. *Reversed*.

A. W. Ostrom and George Herriott, for Appellants.

To constitute actionable fraud, each of the necessary elements must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery. (20 Cyc. 12, sec. A, and cases cited; *Brown v. Bledsoe*, 1 Ida. 746.)

A fraudulent intent is an essential element of every actionable fraud, and to support an action of deceit the existence of this intent must in some way be made manifest. (20 Cyc. 35, sec. 6, and cases cited; *Lewark v. Carter*, 117 Ind. 206, 10 Am. St. 40, 20 N. E. 119, 3 L. R. A. 440.)

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C. M. Booth, for Respondent.

If the representation is made without belief in its truth, or made recklessly, without caring whether it be true or false, the representation may amount to fraud. (*Derry v. Peek*, L. R. 14 App. Cas. 337; *Eichelberger v. Mills Land etc. Co.*, 9 Cal. App. 628, 100 Pac. 117; *Hindman v. First Nat. Bank*, 112 Fed. 931, 50 C. C. A. 523, 57 L. R. A. 108; *Shackett v. Bickford*, 74 N. H. 57, 124 Am. St. 933, 65 Atl. 252, 7 L. R. A., N. S., 646; *Madden v. Caldwell Land Co.*, 16 Ida. 59, 67, 100 Pac. 358, 21 L. R. A., N. S., 332.)

MORGAN, J.—This action was commenced by appellants to recover the balance alleged to be due upon three promissory notes, for \$400 each, given by respondent in payment for a second-hand gasoline engine, which he purchased from them for the purpose of furnishing power with which to operate a grain-separator.

Respondent, in his answer, admitted the execution of the notes, and that only the amount alleged in the complaint to have been paid thereon had been paid, but denied that any amount was due, and alleged that the machinery for which the notes were given was, by appellants, represented and described to him as being well built, properly adjusted and capable of performing the work for which it was intended; that by reason of these representations he bought the machinery giving therefor the notes above mentioned; that all the statements, representations and claims made by appellants to him regarding the machinery, as to the build, workmanship, adjustment and quality thereof, were false and fraudulent, and were known by appellants to be false and fraudulent at the time they were made; that such statements, representations and claims induced him to make, execute and deliver the notes set out in the complaint, and he claimed damages by reason of the alleged fraud of appellants in the transaction.

The case was tried by a jury, which returned a verdict in favor of appellants for the sum of one dollar. Judgment was thereupon entered, from which this appeal is prosecuted.

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Appellants contend that the evidence is insufficient to establish the falsity of the representations relied upon by respondent.

The portion of the record tending to show that appellants, or either of them, made any representations whatever with respect to the engine is to be found in the testimony of respondent, and is as follows:

"Q. What did Mr. Marshall tell you, if anything, with reference to this engine, so far as its power and capacity was concerned?

"A. He told me it was a 20 horse-power gasoline traction engine and that the separator has a 28-inch cylinder.

"Q. What make of a separator was it?

"A. A Case.

"Q. You say that was a Case separator?

"A. Yes, sir.

"Q. Where did you buy the separator?

"A. From Parker and Marshall. Mr. Marshall was the agent and the man I done the business with.

"Q. Do you know whether or not, at the time you bought this engine, they knew you were buying it to run this separator?

"A. They certainly did; that is what I wanted; I wanted a complete outfit.

"Q. Now, at the time you bought the engine I will ask you to state whether or not Mr. Parker or Mr. Marshall told you anything as to whether or not this engine would successfully run this separator?

"A. That was my understanding, that it would. We had several talks over it; I forget how often we talked about it but it was some two or three times and he didn't say anything to the contrary, and of course we talked it over and I understood it was all right for that purpose.

"Q. You told him what you wanted with the engine, did you?

"A. Yes, sir."

While there is abundance of evidence tending to show that the engine failed, after respondent purchased it, to furnish

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power sufficient to successfully run the separator, it will be observed that the testimony above quoted falls far short of sustaining the allegations of the answer to the effect that statements and representations were made by appellants that the engine was well built, properly adjusted and capable of performing the work for which it was intended. It is true respondent testified that himself and Mr. Marshall talked the matter over, and it was his understanding that the engine would do the work, but the evidence does not justify the conclusion that this understanding was produced by any statements or representations, false or otherwise, made to him. The only statement by Mr. Marshall which respondent attempted to quote, even in substance, is to the effect that it is a 20 horsepower gasoline traction engine, and there is nothing in the record to indicate that it is not. Upon the other hand, it is shown that the engine in question is rated by its manufacturers as of 20 horse-power, and the record discloses that while in possession of its former owner its work was entirely satisfactory and the power it developed was amply sufficient to run the separator.

If, by any stretch of the imagination, the conclusion could be reached from the evidence in this case that Marshall made representations to respondent which were untrue and which misled and deceived him into buying the engine, a material element of fraud, as the basis of an action or defense in a case of this kind, would still be lacking. In addition to the falsity of representations, it must be shown that the party making them knew them to be false or that he made them recklessly without knowledge of their truth or falsity. If he honestly believed the representations to be true and they were not recklessly made, then he is not liable for fraud. (20 Cyc. 24; *Security Savings Bank of Wellman v. Smith*, 144 Iowa, 203, 122 N. W. 825; *Curtley v. Security Savings Soc.*, 46 Wash. 50, 89 Pac. 180; *Wilde v. Oregon Trust etc. Bank*, 59 Or. 551, 117 Pac. 807; *Wann v. Northwestern Trust Co.*, 120 Minn. 493, 139 N. W. 1061; *Peters v. Lohman*, 171 Mo. App. 465, 156 S. W. 783.)

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The evidence discloses that appellants, who are dealers in gasoline engines and accessories, during the fall of 1910 sold the engine to a Mr. Eveleth, who used it in connection with the separator, and that it gave entire satisfaction; that Marshall saw the engine while it was being so used; that Eveleth had trouble in meeting certain payments of the purchase price and consented that it be sold to respondent, who, at appellants' request, went to Eveleth's place, inspected the engine and thereafter bought it.

The burden of proof to show scienter was upon respondent. Not only has he offered no evidence tending to show that false statements were made with knowledge of their falsity, or with reckless disregard of what the facts might be, but the uncontradicted evidence indicates that appellants acted entirely in good faith; that the statement as to the horsepower of the engine was based upon the rating given it by its manufacturers, and it had been seen, by the man who made the representations, to do the class of work an engine of that capacity should do.

We do not desire to be understood to hold that it is necessary, in order to establish fraud, to show what was in the mind of a man, shown to have made misrepresentations of a material fact, at the time he made it. Circumstances inconsistent with an honest, reasonable belief in the truth of the statements, or indicating a reckless disregard for the truth, may be shown, from which a jury may conclude scienter, but in this case there is a total lack of such circumstances.

The necessity for proof of scienter distinguishes such an action as this from one for breach of warranty. (*Northwestern S. S. Co. v. Dexter Horton & Co.*, 29 Wash. 565, 70 Pac. 59.)

The judgment is reversed, with direction that a new trial be granted. Costs are awarded to appellants.

Budge, C. J., and Rice, J., concur.

Argument for Appellant.

(April 21, 1917.)

WEISER NATIONAL BANK, a Corporation, Appellant, v.
WASHINGTON COUNTY et al., Respondents.

[164 Pac. 1014.]

BANKS—TAXATION—STATUTES—CERTIORARI.

1. In proceedings upon writ of review, the constitutionality of the statute upon which the inferior tribunal, the action of which is reviewed, based its authority cannot be passed upon.

2. According to the intent and purpose of sec. 173 of the Revenue Act of 1913 (Sess. Laws 1913, p. 230), the proportion of the capital stock, surplus and undivided profits of a bank invested in or represented by property outside of the county in which the bank is located is not to be deducted from the full cash value of its capital stock in listing the same for assessment.

[As to taxation of banks by the states, see notes in 96 Am. Dec. 290; Ann. Cas. 1912D, 37.]

APPEAL from the District Court of the Seventh Judicial District, for Washington County. Hon. Chas. P. McCarthy, Presiding Judge.

Petition for writ of review. From a judgment granting part of the relief sought, the petitioner appeals. *Affirmed.*

Ed. R. Coulter, for Appellant.

This revenue act must be read and construed as a whole, and the whole must be interpreted to give meaning to the intent of the legislature. It is true that in sec. 173 there are two different phrases which seem at first reading to limit the real estate to that within the county. Take the whole act, secs. 4, 173-180, and construe them together, and it clearly appears that it was not the intention that there should be any double taxation or lack of uniformity. Read the sections 161-171 on taxation of migratory stock. There the same clear intent appears.

Argument for Respondents.

In the sections on migratory stock, they provide for an adjustment between the counties of the tax for the year on such stock. The legislature in those sections properly use the words "counties" in fixing status of the property. We find them immediately taking up the question of taxation of banks and bank shares and using their same word "county," and using it in a sense which is clearly at variance with the evident intent and purpose which was in the minds of the legislators.

"Whenever a statute contains a clause which is directly contrary to the legislative intent, as collected from the whole act, such clause will be treated as surplusage and will be disregarded in the proper construction of the act." (*State v. Forch*, 26 Ida. 755, 760, 146 Pac. 110.)

Statutes will be construed with the view of ascertaining the intent of the law-making power and giving force and meaning to the language used. (*Idaho Mutual Co-operative Ins. Co. v. Myer*, 10 Ida. 294, 77 Pac. 628; *Greathouse v. Heed*, 1 Ida. 494; *Empire Copper Co. v. Henderson*, 15 Ida. 635, 99 Pac. 127; *In re Bossner*, 18 Ida. 519, 110 Pac. 502; Sutherland on Statutory Construction, sec. 347.)

T. A. Walters, Atty. Genl., J. P. Pope, Asst., George Donart and Harris & Smith, for Respondents.

A writ of review cannot be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued its authority or has exceeded its jurisdiction (Rev. Codes, sec. 4968), and it is equally well established that the question of jurisdiction is to be determined by the terms of the statute, and that the question of constitutionality of the statute cannot be reviewed on *certiorari*. (*Adleman v. Pierce*, 6 Ida. 294, 55 Pac. 658; *Wright v. Kelley*, 4 Ida. 624, 43 Pac. 565; *McConnell v. State Board of Equalization*, 11 Ida. 652, 83 Pac. 494.)

Authorities are very meager which construe or define the term "uniformity" as applied to taxation. But it would seem that both the better reasoning and the weight of authority confines the application of the term to the rate of

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taxation and not to the mode of assessment. (*People ex rel. Iron Silver Mining Co. v. Henderson*, 12 Colo. 369, 21 Pac. 144; *Sherlock v. Winnetka*, 68 Ill. 530; *People v. Whyler*, 41 Cal. 351.)

MORGAN, J.—The appellant is a national bank located at Weiser, in Washington county. On the second Monday of January, 1915, its capital stock was \$75,000, divided into 750 shares of the par value of \$100 each; its surplus and undivided profits amounted to \$15,540, making a total of \$90,540. It appears that \$32,368 of this amount was invested in the bank building, furniture and fixtures, \$4,350 in real estate in Weiser, \$1,652.67 in real estate in Owyhee county, and \$2,600 in real estate in Adams county. In April, 1915, appellant gave to the assessor of Washington county a sworn statement showing the capital stock, surplus and undivided profits as they existed on the second Monday of January, 1915, and also the proportionate amount of the same which was invested as above set forth. The assessor deducted from the sum of \$90,540 the \$32,368 invested in the bank building, furniture and fixtures, and the remainder, \$58,172, he prorated among the 750 shares of stock and assessed it against the shares in the names of the shareholders. The other real estate was assessed, respectively, by the assessors of Washington, Owyhee and Adams counties, and the taxes upon the same were paid by the bank. The payment of taxes assessed against the capital stock of the bank to the assessor and tax collector of Washington county was made under protest and a petition was filed with the board of county commissioners, sitting as a board of equalization, praying that an additional deduction from the capital stock, surplus and undivided profits, amounting to that proportion of the same invested in the real estate in the three counties above named and not used in connection with the bank, be allowed. This was denied. Appellant thereafter procured a writ of review from the court below and respondents moved to quash the same. After hearing the matter the court made and entered findings of fact, conclusions of law and judgment modifying the action of the

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board of equalization only to the extent that the deduction prayed for was allowed so far as it related to the property situated in Washington county. This appeal is from that judgment.

The question to be determined is this: Should the amounts invested in property outside of Washington county, the county in which the bank is located, have been deducted from the total capital stock, surplus and undivided profits before the same was assessed and prorated among the shareholders? The question involves a construction of sec. 173 of the Revenue Act of 1913, found on page 230 of the Session Laws of that year, which is as follows:

“The shares of capital stock of any bank, existing by authority of the United States or of this State and located within this State, or of any building and loan association, trust company or surety and fidelity company organized under the laws of this State and doing business within this State, shall be assessed for taxation where such bank, company, association or other corporation is located and not elsewhere, at the full cash value thereof at twelve o'clock meridian on the second Monday of January in each year, except the proportionate part of any portion of such capital stock, or the surplus or undivided profits of such bank, company, association or other corporation which is at the time of assessment actually invested in and represented by other property owned by and standing upon the records of the county wherein such shares of capital stock is assessed in the name of such bank, company, association or other corporation and which has been assessed and entered for taxation in said county for the said year, which proportionate part of such portion shall be deducted from the full cash value of such shares of capital stock in listing such capital stock for assessment; Provided, That no deduction in the assessed valuation of such shares of capital stock shall be made on account of any property obtained by such bank, company, association or other corporation on foreclosure of any lien, or in the settlement of any debt, unless it is shown to the satisfaction of the Assessor that the amount sought to be so deducted is actually included in the

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value of such capital stock. Any property so represented in such capital stock, on account of which a deduction has been made in the assessed valuation of the shares of such capital stock, shall be assessed separately at its full cash value, as other property."

Appellant insists that this section should be so construed as to make a deduction from the assessment of the capital stock, surplus and undivided profits of the bank by reason of its ownership of property situated in and taxed in other counties of the state as well as in the county wherein the bank is located, and insists that if the language of the law be literally construed, it will be violative of sec. 5, art. 7, of the constitution, wherein it is provided that "all taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax," and "duplicate taxation of property for the same purpose during the same year, is hereby prohibited."

The proceedings in the court below were upon *certiorari*, or, as denominated by our Revised Codes, writ of review. Secs. 4962 and 4968, Rev. Codes, limit the extent of the inquiry which may be made in proceedings upon writ of review. The court below could not, in this case, and, consequently, we cannot determine the constitutionality of the act under which the inferior tribunal claimed its authority. (*McConnell v. State Board of Equalization*, 11 Ida. 652, 83 Pac. 494.)

Proceeding upon the theory that sec. 173, Revenue Act of 1913, *supra*, is valid and, as above indicated, its constitutionality cannot be questioned in this proceeding, its language is too plain to permit of judicial interpretation. To hold differently and sustain the contention of appellant above stated would be, in effect, to repeal the section and substitute a new law.

The judgment of the district court is affirmed. Costs are awarded to respondents.

Rice, J., sat at the hearing but took no part in the decision of this case.

Points Decided.

BUDGE, C. J., Concurring.—I concur in the conclusion reached, upon the ground that the constitutionality of the statute cannot be inquired into upon a writ of review, and viewing the statute (sec. 173, Revenue Act of 1913) in this light, its language is unambiguous. However, I do not wish to be understood as intimating that the law is constitutional or that its constitutionality is not subject to attack, in a proper proceeding, upon the ground of double taxation.

(April 24, 1917.)

STATE, Respondent, v. CLYDE SMITH, Appellant.

[164 Pac. 519.]

GRAND LARCENY—ACCOMPLICE—CORROBORATION—SUFFICIENCY OF—SEPARATE TRIAL—INSTRUCTIONS—SUFFICIENCY OF—CHALLENGE INDIVIDUAL JUROR—EVIDENCE.

1. A conviction cannot be sustained on the uncorroborated testimony of an accomplice; but it is not necessary that the testimony of the accomplice be corroborated in every detail,—all that is required is, that there be corroborating evidence upon some material fact or circumstance, which, in itself, and without the aid of the testimony of the accomplice, tends to connect the accused with the commission of the offense.

2. The law clearly contemplates that some weight should be given to the testimony of an accomplice, and when the requirements of the law as to corroboration have been met, such testimony may become of the utmost importance in securing a just enforcement of the law.

3. Under section 7860, Rev. Codes, as amended by ch. 112, Sess. Laws 1911, p. 368, the granting or refusal of a separate trial rests in the sound discretion of the trial court.

4. Where counsel for accused, at the time of the giving of an instruction, states that it is satisfactory, he cannot on appeal from an adverse decision complain of the conduct of the trial court.

5. Where accused is represented by counsel during the trial, and exercises the right to challenge jurors, the neglect of the trial court to inform him that if he intends to challenge an individual juror

Argument for Appellant.

he must do so before the jury is sworn, will not be regarded as prejudicial error.

6. The evidence in this case examined and held sufficient to sustain a conviction.

7. Instruction No. 11 examined and found not to be prejudicial to the appellant.

[As to convicting on the testimony of an accomplice, see notes in 71 Am. Dec. 671; 34 Am. Rep. 408; 98 Am. St. 158.]

APPEAL from the District Court of the Seventh Judicial District, for Adams County. Hon. Ed. L. Bryan, Judge.

Appellant was convicted of the crime of grand larceny, and appealed from the judgment and order overruling a motion for a new trial. *Affirmed.*

Frank Harris, P. E. Cavaney and Freehafer & Stinson, for Appellant.

The identity of the cattle in the case at bar must be established. (*Newton v. State* (Tex. Cr.), 48 S. W. 507; *Hilligas v. State*, 55 Neb. 586, 75 N. W. 1110; *Shelby v. State* (Tex. Cr.), 42 S. W. 306.)

Where evidence establishes similarity merely and there is no other evidence of identification, conviction cannot be supported. (*Bishop v. People*, 194 Ill. 365, 62 N. E. 785; *Bishop v. State* (Tex. Cr.), 25 S. W. 25; *Beach v. State* (Tex. App.), 11 S. W. 832.)

Possession by the defendant of the same number of cattle as was stolen is not sufficient to justify conviction. (*Harris v. State*, 13 Tex. App. 309; *Smith v. State*, 44 Tex. Cr. 81, 68 S. W. 510; *Horn v. State*, 30 Tex. App. 541, 17 S. W. 1094.)

Testimony of accomplice must be corroborated by other testimony which in itself and standing alone tends to connect defendant with the commission of the offense. (*People v. Koenig*, 99 Cal. 574, 34 Pac. 238; *People v. Ames*, 39 Cal. 403; *People v. Thompson*, 50 Cal. 480; *Coleman v. State*, 44 Tex. 109, 111; *State v. Grant*, 26 Ida. 189, 140 Pac. 959; *State v. Rooke*, 10 Ida. 388, 79 Pac. 82; *Middleton v. State*, 52 Ga. 527.)

Argument for Respondent.

An accomplice must be corroborated as to the *corpus delicti*. (*Smith v. State*, 10 Wyo. 157, 67 Pac. 977; *State v. Williams*, 46 Or. 287, 80 Pac. 655; *State v. Koplan*, 167 Mo. 298, 66 S. W. 967; *State v. Stevenson*, 26 Mont. 332, 67 Pac. 1001; *Bines v. State*, 118 Ga. 320, 45 S. E. 376, 68 L. R. A. 33.)

Evidence obtained from the testimony of an accomplice is now universally looked upon as coming from a polluted source and received only from necessity and policy. (*United States v. Lancaster*, 2 McLean, 431, 26 Fed. Cas. No. 15,556; *United States v. Henry*, 4 Wash. (C. C.) 428, Fed. Cas. No. 15,351; *United States v. Smith*, 2 Bond, 323, 27 Fed. Cas. No. 16,322; 1 Enc. Ev. 98, and cases cited.)

Legal corroboration, when applied to an accomplice, consists of independent evidence tending to support his testimony. (*People v. Elliott*, 44 Hun, 623, 5 N. Y. Crim. Rep. 204, 8 N. Y. St. Rep. 223; 1 Enc. Ev. 103; *Johnson v. State*, 4 G. Greene (Iowa), 65; *State v. Williamson*, 42 Conn. 261; *Powers v. Commonwealth*, 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 53 L. R. A. 245.)

Refusing to grant separate trials was clearly an abuse of the court's discretion. (*Davis v. People*, 22 Colo. 1, 43 Pac. 122; *Commonwealth v. James*, 99 Mass. 438.)

The giving of instruction No. 11 tended to confuse the jury. This instruction was criticised in *State v. Wright*, 12 Ida. 212, 85 Pac. 493, and in *State v. Janks*, 26 Ida. 567, 144 Pac. 779. This instruction also assumed a statement of facts to have been proved, which were not. (*State v. Walters*, 7 Wash. 246, 34 Pac. 938, 1098; *State v. Eubank*, 33 Wash. 293, 74 Pac. 378.)

T. A. Walters, Atty. Gen., J. Ward Arney and A. C. Hindman, Assts., and L. L. Burtenshaw, Pros. Atty., for Respondent.

The granting or refusing of new trials lies in the sound discretion of the trial court. (*State v. Driskell*, 12 Ida. 245, 247, 85 Pac. 499.)

The record discloses that the testimony of the accomplice in this case was corroborated by other testimony which, standing

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alone, connected the defendant with the commission of the crime. (*State v. Knudtson*, 11 Ida. 524, 83 Pac. 226.)

Instruction No. 11 is a correct statement of the law, and was approved in *State v. Wright*, 12 Ida. 212, 85 Pac. 493.

BUDGE, C. J.—The appellant and one Logan were charged jointly, on information by the prosecuting attorney of Adams county, with the crime of grand larceny. The charging part of the information is as follows:

“That on or about the 15th day of May, 1914, and at Adams County, State of Idaho, the said defendants, Clyde Smith and Lloyd Logan, being then and there, did, there and then, wilfully, unlawfully and feloniously steal, take, carry, lead and drive away from the possession of one Ben Woodden ten head of fat beef cattle branded with a “W” on the right hip, the same then and there being the personal property of the said Ben Woodden, with the intent then and there to convert the said cattle to their own use.”

The defendants pleaded “not guilty” and the cause was tried before the court with a jury. The jury returned a verdict acquitting Logan and finding the appellant guilty as charged in the information. The appellant was sentenced to serve a term of imprisonment in the state penitentiary of not less than one nor more than fourteen years. Thereafter a statement and motion for a new trial were presented and overruled, to which action of the trial court appellant duly excepted.

This is an appeal from the judgment and from the order overruling appellant’s motion for a new trial. Appellant assigns and relies upon forty-five separate assignments of error. It will be unnecessary in this opinion to discuss in detail or separately all of the assignments of error.

The assignment of error principally relied upon by counsel is directed against the sufficiency of the evidence introduced upon the trial to corroborate the testimony of the witness Miller, an accomplice. From an examination of the instructions touching the necessity for corroboration in order to warrant a conviction, and the extent to which corroboration is

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necessary, it appears that the law is fully and sufficiently elucidated therein. It is not necessary that the testimony of an accomplice be corroborated in every detail—all that is required is that there be corroborating evidence upon some material fact or circumstance which in itself, and without the aid of the testimony of the accomplice, tends to connect the accused with the commission of the offense. (*State v. Knudtson*, 11 Ida. 524, 83 Pac. 226; *State v. Bond*, 12 Ida. 424, 86 Pac. 43; *State v. Grant*, 26 Ida. 189, 140 Pac. 959.)

In this case the evidence, independent of any testimony given by the accomplice Miller, conclusively shows: That the cattle in question were the property of and in the possession of Ben Woodden, the owner, on the 15th day of May, 1914, near his residence; that during Woodden's absence for an hour or two on said day, the cattle disappeared; that there were horses' tracks found immediately behind the cattle and following them; that on the same day appellant was seen in possession of the cattle by one Stiles, near his residence, a distance of two or three miles from Woodden's home; that on the night of the 15th of May, 1914, the appellant and Miller stayed at Stiles' place, and permitted the cattle to range within a short distance of his home; that in a conversation with Stiles the appellant told him, among other things, that he was riding after cattle for a couple of men in Boise and that Miller, the accomplice, who was with him at the time, was a new man at the business and had only been on a couple of days; that on the following morning the appellant and Miller rode south in the direction that the cattle were left the night previous; that one Wing, a sheepman, was nearby and he and the witness Stiles walked in the direction of the cattle together; that Wing's dog turned the cattle, and just about that time the appellant came up to Stiles and Wing and cursed them and accused them of dogging the cattle; and that upon the evening prior they came from the direction of the bridge across Little Fork, up above Woodden's ranch, or north of Stiles' home, and on the morning of the 16th they drove the cattle south of Woodden's and Stiles' homes, being in the opposite direction from the Wood-

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den ranch; that on the 24th day of May the cattle were found near Logan's ranch, some fourteen miles from Woodden's ranch, and driven to Indian Valley, where some of them were later identified, while they were confined in the lot back of the Mercantile Store; that the appellant was in the possession of the cattle, with the accomplice Miller, not only on the night of the 15th and on the morning of the 16th, but that they were also in possession of the cattle when they arrived at Logan's place, and during the time that the cattle were held in that vicinity, near Logan's home, up to about the 24th of May, 1914. These facts are not only sufficient corroboration of the accomplice's testimony, but when considered in connection with all of the circumstances were amply sufficient to justify the jury in finding the appellant guilty as charged.

In the case of *People v. Melvane*, 39 Cal. 614, that court, having under consideration a statute identical with ours, says:

"The corroborating evidence may be slight, and entitled to but little consideration; nevertheless, the requirements of the statute are fulfilled if there be any corroborating evidence which, of itself, tends to connect the accused with the commission of the offense."

The law clearly contemplates that some weight should be given to the testimony of an accomplice, if this were not true the law should preclude its admission altogether. The legislature has sought to safeguard the rights of persons accused of crime by providing that the testimony of an accomplice is not sufficient to sustain a conviction except where there is other evidence tending to connect the person accused with the commission of the offense. When such evidence has been supplied the testimony of the accomplice may become of the utmost importance in securing a just enforcement of the law. It is unusual that a person engaged in the commission of a crime will consent to become a witness for the state to the material facts of the crime. Whenever such person does so consent, if his testimony is in itself reasonable and credible and if it is corroborated by other evidence as to the material features of the narration, such testimony may become of the

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most important and satisfactory character. Of course, as in every other criminal charge, the crime must be proven as laid in the information.

It is suggested by appellant that when the cattle were taken he and the accomplice did not intend to steal them, but intended only to take them and hold them for the purpose of procuring a reward for their return. The intent with which the cattle were taken was one of the material questions which was properly submitted to the jury, under all of the evidence, for their determination. Where a particular motive for the crime is alleged in the information and the evidence justifies the jury in finding that such motive did really exist, it is immaterial whether the accused had additional motives. It is sufficient to warrant a conviction if the motive which is alleged in the information is proven. From the evidence the jury were clearly justified in finding that the appellant committed the crime charged in the information, namely, the larceny of the cattle; therefore, whatever other motives he may have had would be wholly immaterial.

Appellant assigns as error the refusal of the trial court to grant him a separate trial. This, however, was in the sound discretion of the trial court. (Section 7860, Rev. Codes, as amended by ch. 112, Sess. Laws 1911.) We do not think the trial court erred in refusing to grant a separate trial in this case. (*State v. Allen*, 23 Ida. 772-778, 131 Pac. 1112.)

Counsel for appellant strenuously insists that the trial court should have submitted the codefendant's case to the jury on an advisory instruction to acquit, at the close of the state's case, in order that Logan might have been acquitted before becoming a witness for appellant, and seeks to predicate prejudicial error on the failure of the trial court to pursue such a course. It appears from the record that at the close of the state's case counsel for appellant moved the court for an advisory instruction to acquit the defendant Logan and appellant. The court sustained the motion as to the defendant Logan, and overruled said motion as to appellant. The court asked appellant's attorney to prepare the instruction, whereupon counsel stated:

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"I think the court can put it in as good language as any counsel for defendant."

The court then gave the following instruction:

"Gentlemen of the Jury: The court will instruct you at this time that in your further consideration of this case and in your deliberations after you have retired for final deliberation you should not consider the defendant Lloyd Logan as connected with this case, and you are further instructed that what the court has said to you with respect to the defendant Lloyd Logan should not be considered by you in any manner or to any degree whatever in connection with your investigation of the charge against the defendant Smith in this case, but is a matter entirely independent of the other matter, and should not influence you in any way for or against the defendant Smith."

Whereupon appellant's counsel stated: "That is satisfactory to the defendants."

The appellant, through his counsel, having indicated that he was satisfied with the instruction given cannot now be heard to complain that his rights in this respect were not protected.

Appellant assigns as error the failure of the court to inform him of the provisions of section 7826, Rev. Codes, which section reads as follows:

"Before a jury is called, the defendant must be informed by the court, or under its direction, that if he intends to challenge an individual juror he must do so before the jury is sworn."

This court held in *State v. Suttles*, 13 Ida. 88, 88 Pac. 238, and *State v. O'Brien*, 13 Ida. 112, 88 Pac. 425, that the record need not affirmatively show that the defendant was instructed as to his right to challenge a juror as required by this section. And in the absence of any showing to establish the fact as to whether or not the court has complied with the requirements of the law in this respect, the presumption is that the court complied therewith and discharged every duty the statute imposed upon it in the trial of the case. This places the burden upon appellant of introducing a proper and satisfactory affirmative showing in the record, pointing out the failure of

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the court to so inform him. We do not think that the record in this case presents a sufficient showing on the point to enable this court to review it. However, waiving the proper presentation of the assignment, appellant has not shown that he was prejudiced by the failure of the court to so inform him, if, as a matter of fact, the court did omit to so inform him. Counsel for appellant have cited two cases in support of their contention. *People v. Monaghan*, 102 Cal. 229, 36 Pac. 511, does not even refer to the point. *People v. Moore*, 103 Cal. 508, 37 Pac. 510, is clearly distinguishable from the case at bar. In the Moore case appellant had no counsel in the trial court and did not exercise the right of challenge, the court in that case saying:

“There is nothing in the record to show that he was not prejudiced by the failure of the court to give the information required by the statute to be given,—nothing which enables us to avoid the general presumption that error is prejudicial. . . . The general rule that everyone is presumed to know the law cannot be successfully invoked in a criminal case against a statute which provides that the defendant must be specially instructed as to what the law is on a particular point.”

The cases reviewed in the Moore case—*People v. Mortier*, 58 Cal. 262, 266; *People v. O'Brien*, 88 Cal. 483, 489, 26 Pac. 362; *People v. Ellsworth*, 92 Cal. 594, 596, 28 Pac. 604—are all to the effect that where, as in this case, appellant was represented by counsel on the trial and exercised his right to challenge jurors, he is not prejudiced by the neglect of the trial court to advise him that if he intends to challenge an individual juror he must do so before the jury is sworn.

Many of appellant's assignments of error are directed against the instructions of the court as given and the refusal to give requested instructions. We will confine this portion of the opinion to a discussion of instructions Nos. 11 and 16 as given by the court. Instruction No. 11 reads as follows:

“Possession of property recently stolen, if proven, is not evidence sufficient of itself to warrant a conviction. It is merely a circumstance tending to show guilt which taken in

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connection with other evidence is to determine the question of guilt. If, however, the jury believes beyond a reasonable doubt that the property described in the information was stolen, and was seen in the possession of the defendant soon after being stolen, the failure of the defendant to account for such possession or to show that such possession was honestly obtained is a circumstance tending to show his guilt; and the defendant is called upon to explain such possession, if such possession has been proved, in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence disclosed any such."

This instruction was sustained by this court in *State v. Wright*, 12 Ida. 212-218, 85 Pac. 493; *State v. Janks*, 26 Ida. 567, 144 Pac. 779. Some slight changes in the wording appear in the instruction as given in the case at bar, but they tend to render the instruction more favorable to the appellant.

Instruction No. 16 reads as follows:

"I further instruct you, that under the law of this state a person charged with the commission of a crime may testify in his own behalf, yet the defendant is under no obligation to do so, and his neglect to do so shall not create any presumption against him."

Appellant insists that this instruction as given is erroneous, in that it does not state the law as fairly for the defendant as the language of the statute upon which it is based. Section 8143, Rev. Codes, is as follows:

"A defendant in a criminal action or proceeding to which he is a party is not, without his consent, a competent witness for or against himself. His neglect or refusal to give such consent shall not in any manner prejudice him nor be used against him on the trial or proceeding."

This court held in *State v. Levy*, 9 Ida. 483, 75 Pac. 227, that it was not error to instruct the jury in the language of this statute. And while we think it would be much better to give the instruction in the language of the statute than to give it in the form used in instruction No. 16, *supra*, we do

Points Decided.

not feel that under the circumstances of this case, the instruction as given amounts to prejudicial error.

We have examined the instructions given by the court, and the instructions requested by the defendant and refused by the court, and are satisfied that the instructions as given fairly and fully stated the law applicable to the facts and circumstances of the case.

Many errors are assigned on questions arising during the trial as to the admissibility of evidence. We have carefully examined the record in this regard, and without discussing these numerous errors in detail, we have to say that we have found no prejudicial error in the record.

The judgment, therefore, is affirmed.

Morgan and Rice, JJ., concur.

Petition for rehearing denied.

(April 24, 1917.)

J. B. COBURN, Appellant, v. H. H. THORNTON, JOHN LOWE and JOHN McMURRAY, as the Board of County Commissioners of Cassia County, Idaho, W. O. PRATT, as Sheriff of said Cassia County, Idaho, UNITED STATES FIDELITY AND GUARANTY COMPANY, and NATIONAL SURETY COMPANY, Respondents.

[164 Pac. 1012.]

CHANGE OF VENUE—DENIAL—APPEAL—MOOT CASE—COSTS—DISMISSAL.

Held, where an appeal from an order of the district court, denying a motion for a change of venue and continuing the cause for the term, is prosecuted upon the ground that the trial judge is disqualified, and where upon the hearing of such appeal it appears that such disqualification has ceased to exist because such trial judge is no longer an incumbent in office, this court will take judicial notice of that fact and the appeal will be dismissed, for the reason

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that no actual relief can now be afforded other than the awarding of costs, and costs being merely incidental to a judgment, do not constitute a matter of controversy sufficient to warrant an appellate court in entertaining an appeal.

[As to change of venue, see note in 74 Am. Dec. 241.]

APPEAL from the District Court of the Fourth Judicial District, for Cassia County. Hon. Edward A. Walters, Judge.

Action for damages. Motion for a change of venue denied and plaintiff appeals. *Dismissed.*

W. E. Abraham and T. Bailey Lee, for Appellant.

S. T. Lowe, for Respondents.

Counsel cite no authorities on point decided.

BUDGE, C. J.—On March 2, 1914, appellant commenced an action against respondents in the district court, in and for Cassia county, for damages alleged to have been sustained while confined in the county jail of said county, for default in payment of a money fine theretofore imposed upon him in said district court. Appellant alleges, among other things, that he had been ordered by the respondent commissioners and sheriff of said county to labor upon the county roads, and upon his refusal to comply with such order he was, by said respondents, unlawfully and maliciously restricted for a period of eleven days to a diet of bread and water, resulting in his physical and mental injury, to his damage in the sum of \$10,000. The respondents filed their verified answer denying the illegality of their conduct, as alleged in plaintiff's complaint, and further denying the existence of malice, and affirmatively alleging the fact to be, that if the appellant suffered loss of health, or sustained injury to his physical or mental condition, or deterioration in weight, that it was due to the confinement by reason of said judgment imposed upon him by the district court, and

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to no act or acts of the respondents or either of them. Respondents further alleged in their answer that they wholly relied, in restricting appellant to a bread and water diet, upon the advice and direction of their legal adviser, namely, the county attorney, and the advice of the Honorable District Judge of the district court, in and for Cassia county.

When the cause came on for trial the appellant made a motion for a change of venue, upon the ground that the presiding judge was disqualified because of the alleged advice that he had given to respondents, to restrict appellant's diet to bread and water should he refuse to perform work and labor upon the highways of said county, as appeared from the sworn answer of the respondents, and filed in said cause. An order was made denying said motion and continuing the cause for the term. This appeal is from the order.

While it is not a matter of record in this case, it is a matter of which this court must take cognizance, that the Honorable Edward A. Walters, then district judge in and for said county, before whom the foregoing proceedings were had, is no longer such district judge. It is therefore apparent that the only ground upon which a change of venue is sought has been removed, and there is no real controversy before this court, for the reason that if the disqualification did exist at the time the motion for a change of venue was made and the cause continued for the term, it is *non esse*. The determination of this appeal in favor of appellant could not result in any actual relief to him, except in the matter of costs. Costs, being merely incidental to a judgment, do not constitute a matter of controversy sufficient to warrant an appellate court in entertaining an appeal. (*Bryan v. Sullivan*, 29 Okl. 686, 119 Pac. 124; *Harper v. Grasser*, 86 Wash. 475, 150 Pac. 1175; *Board of Commrs. v. Stogner* (Okl.), 157 Pac. 923.) Therefore, since the right of the appellant to have a change of venue has ceased to exist, the appeal presents only a hypothetical proposition, and must be dismissed. (*State v. Lambert*, 52 W. Va. 248, 43 S. E. 176; *Albright v. Erickson*, 23 Okl. 544, 102 Pac. 112; 3 C. J. 358; 2 R. C. L. 145; *City of Wallace v. Deane*, 8 Ida. 344, 69 Pac. 62; *Jenal*

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v. Felber, 77 Kan. 771, 95 Pac. 403; *Fain v. Fain*, 140 La. 39, 72 So. 801; *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. ed. 293.) In the latter case the court said:

“The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. . . . ”

From what has been said it follows that the appeal in this case must be dismissed, and it is so ordered. Costs awarded to respondents.

Morgan and Rice, JJ., concur.

(April 24, 1917.)

DON BENNETT, Appellant, v. H. H. THORNTON, JOHN LOWE, JOHN McMURRAY, as the Board of County Commissioners of Cassia County, Idaho, W. O. PRATT, as Sheriff of said Cassia County, UNITED STATES FIDELITY & GUARANTY COMPANY, and NATIONAL SURETY COMPANY, Respondents.

[164 Pac. 1013.]

APPEAL from the District Court of the Fourth Judicial District, for Cassia County. Hon. Edward A. Walters, Judge.

Action for damages. Motion for a change of venue denied and plaintiff appeals. *Dismissed*.

Points Decided.

W. E. Abraham and T. Bailey Lee, for Appellant.

S. T. Lowe, for Respondents.

BUDGE, C. J.—By stipulation of counsel, entered into in this court, the above-entitled cause was submitted with the case of *Coburn v. Thornton et al.*, ante, p. 347, 164 Pac. 1012, the same state of facts being involved. And upon the authority of that case the appeal from the order of the trial court, in this action, denying the motion for a change of venue and continuing the case for the term, is dismissed. Costs awarded to respondents.

Morgan and Rice, JJ., concur.

(April 24, 1917.)

In the Matter of the Organization of DRAINAGE DISTRICT No. 1 OF ADA COUNTY. JOHN W. HAYES et al., Respondents and Cross-Appellants, v. FARMERS' UNION DITCH COMPANY, LIMITED, Cross-Respondent, and DAVID H. EASTMAN et al., Appellants.

[164 Pac. 1018.]

DRAINAGE ACT OF 1913—NONAPPEALABLE ORDER.

1. An order of the district court declaring a proposed drainage district duly organized, under the provisions of section 4, chap. 16, Sess. Laws 1913, is not an appealable order under section 4800, Rev. Codes, since it is not a final order, and a further hearing upon the question in the district court is provided by the drainage act of 1913, which also provides for an appeal from the order of the court confirming the report of the commissioners, upon which appeal the question sought to be raised in this appeal might properly be raised.

2. *Held*, that chap. 16, Sess. Laws 1913, and amendments thereto, providing for the establishment of drainage districts, does not provide for an appeal from an order of the district court declaring a

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district duly organized, after the first hearing upon the petition for such organization, and such preliminary order of the district court does not finally adjudicate any of the rights involved in proceedings under the provisions of said chapter.

[As to what judgments and orders may be appealed from, see note in 20 Am. St. 173.]

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Carl A. Davis, Judge.

Appeal from an order declaring drainage district duly organized, and from an order excluding the Farmers' Union Ditch Company, Limited, from said district. *Dismissed.*

Martin & Cameron, for Appellants.

B. F. Neal, for Respondents and Cross-appellants.

Cavanah & Blake, for Cross-respondent.

Richards & Haga and McKeen F. Morrow, *Amici Curias.*

Counsel cite no authorities on points decided.

BUDGE, C. J.—This is an appeal from an order declaring a proposed drainage district duly organized. A cross-appeal has also been prosecuted by the respondent drainage district from that portion of the court's order excluding the Farmers' Union Ditch Company, Limited, from the district. A petition was filed in the district court for Ada county, signed by a great number of land owners in the proposed district, and praying that the lands and property described in said petition be organized into a drainage district under the provisions of chap. 16, Sess. Laws 1913, and amendments thereto. The appellants, objecting land owners, filed objections and remonstrances and sought to have their lands excluded from the proposed district.

After due notice a hearing was had upon the petition and evidence was received touching the matters at issue. The court prepared findings of fact and conclusions of law and

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entered an order declaring the proposed district duly organized, defining the boundaries thereof and excluding from the district the Farmers' Union Ditch Company, Limited, cross-respondent. From this order the appeal and cross-appeal were prosecuted.

Upon our investigation and consideration of this case we find that we are confronted at the very outset with the serious question: Is the order which the trial court entered an appealable order? Or, in other words, are the appeals being prematurely prosecuted?

Section 4800, Rev. Codes, provides: "A judgment or order, in a civil action, except when expressly made final, may be reviewed as prescribed in this Code, *and not otherwise.*" (Italics ours.)

The law under which this proceeding was instituted provides: First, that a petition shall be presented. Second, that a notice shall be given, setting the time and place at which the district judge will consider said petition. Third, upon the hearing any person or corporation may appear before the court and make objection to the organization of the district and the proposed boundaries thereof, and upon final hearing the judge shall make such changes of the proposed boundaries as he may deem proper and shall establish and define such boundaries, and shall ascertain and determine the approximate number of acres which will be benefited by the proposed system, and shall find whether the proposed system will be conducive to the public health, welfare or convenience, or increase the public revenue, or be of special benefit to the majority of the land included within the proposed boundaries of the district as established. But said judge may not change the boundaries so as to include any territory outside the boundaries described in the petition, and the judge shall cause an order to be entered by the clerk and recorded in the judgment record, setting forth the facts found. Fourth, upon the entry of the findings, if the judge finds said proposed drainage system to be conducive, either to the public health, welfare, or convenience, or that it will increase the public revenue, or be of special benefit to the majority in acreage of the

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lands included in said boundaries, he shall declare said district duly organized, and within ten days thereafter shall appoint three drainage commissioners. The clerk of said district court shall cause a copy of the order, declaring said district organized, to be filed in the office of the Secretary of State, and from and after the date of said filing said organization shall be deemed complete. Fifth, after the drainage commissioners have qualified they are to proceed with the survey of the proposed district and report their findings to the court; if after this investigation they find that the costs, expenses and damages are more than equal to the benefits that will be bestowed upon the lands, they shall so report and the proceedings shall be dismissed. If, on the other hand, they find that the costs will be less than the benefits, they shall so report, and the court shall then make and enter an order fixing a time and place when and where all persons interested may appear and contest the confirmation thereof, and notice is provided to be given of this hearing. Sixth, any of the land owners or any person or corporation affected by the work proposed may appear on the day set for hearing and remonstrate against the whole or any part of the proposed work. The district court or the presiding judge may then fix a time for hearing the objections. If any person demands it, a jury will be impaneled to try the question of assessed benefits or awarded damages, all other issues arising on remonstrances are to be tried by the court, and if the court finds that the report requires modification, the same may be referred to the commissioners, *who may be required to modify it in any respect.* (Italics ours.) If the findings be awarded against the validity of the proceedings the same may be dismissed, if the findings are in favor of the validity of the proceedings the court, after the report shall have been modified to conform to the findings, or if there be no remonstrances, shall confirm the same, which order of confirmation is subject to the right of appeal to the supreme court; such appeal shall bring before the supreme court the propriety and justice of the amount of damages or assessment of benefits in respect to the parties to the appeal. If the proceedings are dismissed the commis-

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sioners of the district have the same right of appeal. It appears [ch. 16, section 12, Sess. Laws 1913] that if the commissioners find that the proposed district, as described in the petition filed, will not embrace all of the lands that will be benefited by the proposed work, or that it will include lands that will not be benefited and not necessary to be included in said district for any purpose, they may extend or contract the boundaries of the proposed district so as to include or exclude all such lands, the only limitation upon this being that such alteration shall not have the effect of so far enlarging or contracting said district as to render said petition void or dismissible.

It will be seen from this *résumé* of the statutory provisions that the order appealed from is not a final order. It may happen that when the commissioners make their report, as above outlined, the lands of appellants may be excluded from the district. At any rate, a further hearing upon the question is provided to be had in the district court, and the statute expressly provides for an appeal from the order confirming the report, upon which appeal the questions sought to be raised in the case at bar may be raised. The statute does not provide for an appeal from the order of the district court which follows the first hearing upon the petition. There has been no final adjudication of the rights involved under the procedure outlined in the drainage act of 1913 and the amendments thereto. The order entered is not final, but is expressly made subject to modification in any respect, by the court, even to the extent of a complete dismissal of the proceedings.

We have reached the conclusion, therefore, that under the provisions of section 4800, Rev. Codes, quoted above, this court is without jurisdiction to entertain the present appeals, for the reason that the judgment or order appealed from is not a final judgment or order. (*Adams v. McPherson*, 3 Ida. 117, 27 Pac. 577; *Connell v. Warren*, 3 Ida. 117, 27 Pac. 730; *Thiessen v. Riggs*, 5 Ida. 21, 46 Pac. 829; *Potter v. Talkington*, 5 Ida. 317, 49 Pac. 14; *Cady v. Keller*, 28 Ida. 368-371, 154 Pac. 629; *Weiser Irr. Dist. v. Middle Valley etc. Co.*, 28 Ida.

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548-553, 155 Pac. 484; *Doudell v. Shoo*, 159 Cal. 448, 114 Pac. 579; *Williams v. Field*, 2 Wis. 421, 60 Am. Dec. 426, and note.)

Both appeals are dismissed. Costs awarded to respondents and cross-respondent.

Morgan, J., concurs.

Rice, J., sat at the hearing of this case but took no part in the opinion.

(April 25, 1917.)

R. W. KATERNDAHL, Plaintiff, v. W. T. DAUGHERTY,
Secretary of the State of Idaho, Defendant.

[164 Pac. 1017.]

MANDAMUS—STATUTES—PUBLICATION OF.

1. Under sec. 10 of art. 4 of the constitution, every bill passed by the legislature shall, before it becomes a law, be presented to the Governor. If he approve, he shall sign it and thereupon it shall become a law. *Held*, that where a bill, properly certified by the presiding officers of the two Houses of the legislature, was presented to the Governor and approved and signed by him, no amendment or alteration of the bill so approved and signed can be made.

2. Under chap. 141, 1913 Sess. Laws, p. 502, it is made the duty of the Secretary of State to publish or cause to be published in book form a sufficient number of books containing all the laws, resolutions and memorials passed by each session of the legislature of the state of Idaho. *Held*, that where a law is properly certified by the presiding officers of the two Houses of the legislature, and is approved and signed by the Governor and lodged in the office of the Secretary of State, such officer cannot be required by writ of mandate to make any alteration or insert any amendment in the law so certified and approved.

[As to official duties the performance of which may be compelled by *mandamus*, see note in 125 Am. St. 492.]

Original application by R. W. Katerndahl for writ of mandate. Writ denied.

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R. W. Katerndahl, *pro se*.

The court may go back of the certificate or enrolled bill and investigate the journals of the various Houses of the legislature to ascertain whether the law was really passed and what the law really is. (*Weill v. Kenfield*, 54 Cal. 111; *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 481, 11 Pac. 3; *People v. Dunn*, 80 Cal. 211, 13 Am. St. 118, 22 Pac. 140; *Tarr v. Western Loan etc. Co.*, 15 Ida. 741, 99 Pac. 1049, 21 L. R. A., N. S., 707; *State v. Wendler*, 94 Wis. 369, 68 N. W. 759; *Smithee v. Campbell*, 41 Ark. 471; *Colin v. Kingsley*, 5 Ida. 416, 49 Pac. 985, 38 L. R. A. 74.)

T. A. Walters, Atty. Genl., for Defendant.

In the case of *In re Drainage District No. 1*, 26 Ida. 311, 143 Pac. 299, L. R. A. 1915A, 1210, the court modified its holding in *Cohn v. Kingsley*, 5 Ida. 416, and while holding that the journal entries may be resorted to as evidence to prove either the regularity or the irregularity of the passage of a law, it held that unless the journal shows affirmatively that the legislature has failed to comply with each step required to be taken in the passage of an act under the provisions of the constitution, the presumption is that the legislature did comply with all of such provisions. (*State v. Lynch*, 169 Iowa, 148, 151 N. W. 81, L. R. A. 1915D, 119; *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. ed. 294.)

Where the journals of both Houses showed that an act was amended by adding a certain section but the enrolled act did not contain such section, the court presumed that the amendment was reconsidered and defeated. (*McKinnon v. Cotner*, 30 Or. 588, 49 Pac. 956.)

When the bill approved by the Governor and authenticated as the law requires is materially different from the bill passed by the two Houses, it will be held a nullity. (Sec. 52, Lewis' Sutherland Stat. Const.)

RICE, J.—This is an application for writ of mandate to require the defendant, as Secretary of State, to correct

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enrolled House Bill No. 14 by inserting therein a certain amendment and to publish the same as so corrected.

By the agreed statement of facts, it appears that House Bill No. 14 was regularly passed by the House of Representatives and transmitted to the Senate; that the Senate amended the bill, passed the same as amended and transmitted it to the House; that the House thereupon concurred in the Senate amendment and passed the bill as amended; that it was referred to the committee on engrossed and enrolled bills for enrollment, and that thereafter it was reported correctly enrolled. The bill was signed by the Speaker of the House and transmitted to the Senate; it was duly signed by the President of the Senate and transmitted to the Governor for approval, and approved by the Governor, as enrolled, on the 20th day of March, 1917. It was further agreed that the bill now on file in the office of the Secretary of State, bearing the signatures of the presiding officers of the two Houses and the Governor, does not contain the amendment which was made by the Senate and agreed to by the House.

By the provisions of chap. 141, 1913 Sess. Laws, p. 502, it is made the duty of the Secretary of State to publish or cause to be published in book form a sufficient number of books containing all the laws, resolutions and memorials passed by each session of the legislature of the state of Idaho.

Sec. 10 of art. 4 of the constitution reads in part as follows: "Every bill passed by the legislature shall, before it becomes a law, be presented to the Governor. If he approve, he shall sign it, and thereupon it shall become a law; but if he did not approve, he shall return it with his objections to the house in which it originated, which house shall enter the objections at large upon its journals and proceed to reconsider the bill." Under this section of the constitution, no bill can become a law unless it is presented to the Governor for his approval. By the agreed statement of facts the bill as amended was never presented to the Governor

Points Decided.

and therefore cannot be a law of the State. This proposition is sufficient to dispose of this case.

The question as to whether the bill as certified by the presiding officers of the two Houses of the legislature, and signed by the Governor, is a valid law is not presented in this case and will not be decided.

The writ is denied.

Budge, C. J., and Morgan, J., concur.

(April 27, 1917.)

HARVEY S. GREEN and E. A. SMITH, Respondents, v. CONSOLIDATED WAGON & MACHINE COMPANY, a Corporation, and H. C. VANAUSDELN, Sheriff of Twin Falls County, Idaho, Appellants.

[164 Pac. 1016.]

INJUNCTION—CONTRACT—CROP MORTGAGE—ASSUMPTION OF MORTGAGE DEBT—ASSIGNMENT OF WAGES—CREDITOR BENEFICIARY.

1. Evidence examined and *held* sufficient under a written contract to sustain the findings of the trial court to the effect that the respondents did not assume and agree to pay the indebtedness secured by mortgage of appellant, Consolidated Wagon & Machine Co.

2. The lien of a chattel mortgage executed upon a crop to be grown upon leased premises does not attach to a crop subsequently planted thereon by another than the lessee.

3. Parol testimony is incompetent to vary the terms of a written contract, but may be admitted to explain a latent ambiguity.

4. Where one enters into a contract to labor with the understanding that the proceeds of said labor shall be paid *pro rata* to creditors, a subsequent assignment of the wages earned, without the consent of the said creditors, is invalid in that there is nothing owing under said contract upon which the assignment could operate.

[As to chattel mortgage on growing crops and whether the lien continues after severance, see note in 18 Am. St. 770.]

Opinion of the Court—Rice, J.

APPEAL from the District Court of the Fourth Judicial District, for Twin Falls County. Hon. C. O. Stockslager, District Judge.

Action for injunction. From a judgment for the plaintiffs, defendants appeal. *Affirmed.*

J. H. Wise, for Appellants.

It is our contention under sec. 3406, Rev. Codes, relating to chattel mortgages, that Corum caused the crops in dispute to be sown, and retained an interest therein, to the amount of the mortgage of appellant. (*Collins v. Brown*, 19 Ida. 360, 114 Pac. 671; *Eckles v. Ray*, 13 Okl. 541, 75 Pac. 286; *Reeves & Co. v. Sheets*, 16 Okl. 342, 82 Pac. 487.)

Sweeley & Sweeley, for Respondents.

Where a lessee, who had given a mortgage upon crops to be planted in the future, terminates his lease before said crops are planted, no lien of the mortgage attaches to crops planted on the land by other persons. (*Gammon v. Buel*, 86 Iowa, 754, 53 N. W. 340.)

RICE, J.—This action was brought by the respondents herein to obtain an injunction against the appellants, restraining them from proceeding with the foreclosure of a chattel mortgage given upon crops to be grown during the year 1913 upon certain land described in the complaint. The appellant, Consolidated Wagon & Machine Co., answered denying the material allegations of the complaint, and by way of cross-complaint set up their note and mortgage, and nonpayment of the same, and asked for a foreclosure thereof. They also asked for a judgment against respondents for the amount represented by their note.

On Nov. 24, 1911, the respondents leased certain land to one T. L. Corum for a term of four years. Under the terms of the said lease, Corum was to receive two-thirds of the crops raised on the said premises during the term

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of the lease. On Dec. 9, 1912, Corum and his wife executed a chattel mortgage to appellant, Consolidated Wagon & Machine Co., covering all crops then growing or to be grown during the year 1913 upon the land included within the lease, to secure the payment of a note for \$878.10. The mortgage was filed for record in the office of the recorder of Twin Falls county. On April 12, 1913, Corum and respondents, by an instrument in writing, released each other from their mutual obligations under the terms of said lease. Thereupon, on the same day, Corum and respondents entered into a written contract, whereby Corum for the consideration therein named agreed to cultivate, seed and corrugate the lands which had been included within the lease, being the same lands mentioned in the chattel mortgage. According to the terms of the contract between Corum and respondents, Corum was to receive only as much of the money to be earned thereunder as was necessary to pay his expenses while he was thus engaged. The balance of the money after completion of the contract was to be disposed of according to the following paragraph contained in the said contract: "That when said work is completed and said moneys shall become thereby due, the party of the first part shall pay the same to the creditors of the said second party *pro rata*, except that a certain chattel mortgage covering a crop owned by said party of the first part, and now planted, shall be caused to be released, and so much money as may be necessary therefor shall be first used to that purpose."

At the time of the giving of the chattel mortgage and the execution of the release and the contract last mentioned, only eighty acres of the said premises had been planted. The respondents excepted this eighty acres in their complaint, and did not ask for an injunction against the foreclosure of the chattel mortgage upon the crop thus planted.

After the execution of the release, Corum, under the contract between himself and respondents, had no interest in the crops, but occupied the position of an employee. Under sec. 3406, Rev. Codes, the lien of the mortgage given by Corum to appellant, Consolidated Wagon & Machine Co.,

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did not attach to the crops sown by the respondents upon the lands described in the mortgage or any interest therein. The injunction was therefore properly granted.

Appellants, however, assign as error the action of the court in holding that the respondents did not assume and agree to pay the mortgage made and executed by Corum and wife upon Dec. 9, 1912, and in not giving the answering appellant a judgment for the amount of the note secured thereby. Appellants base their contention upon the paragraph of the contract of employment above quoted. The paragraph referred to appears to be somewhat ambiguous. Upon its face the court would not be justified in holding that the respondents had assumed and agreed to pay Corum's note. Appellants attempted to show by oral testimony of certain witnesses that the respondents did assume and agree to pay this note. We think the written paragraph contains the contract between the parties, and that the oral testimony of witnesses is incompetent for the purpose of proving the contract between the parties, or for any purpose other than explaining the ambiguity of the written contract. With reference to the oral testimony, it must be said that it fails to show that it was the intention of the parties that the respondents should assume the payment of Corum's note. The contract was not to pay Corum's debt to appellant, Consolidated Wagon & Machine Co., but only to cause the release of the chattel mortgage on the crop then planted, and for that purpose the respondents might use as much money as would be necessary.

The trial court did not err in finding that the respondents did not at any time assume or agree to pay the mortgage of the said Corum, nor in failing to give judgment against the respondents for the amount thereof.

It appears that on July 5, 1915, Corum assigned to appellant company the sum of \$906 earned by him upon his contract of employment. Appellants contend that by virtue of this assignment the company is entitled to judgment for said amount. By the terms of the contract itself, Corum had already entered into an agreement as to the manner

Points Decided.

in which the amount earned by him was to be disbursed, and for that reason was unable, without the consent of the other parties interested, to make an assignment thereof in a manner contrary to the provisions of the contract.

Finding no error in the record, the judgment of the district court is affirmed. Costs awarded to respondents.

Budge, C. J., and Morgan, J., concur.

(April 28, 1917.)

OMAHA STRUCTURAL STEEL WORKS, a Corporation,
Appellant, v. F. H. LEMON and S. J. DOOLITTLE,
Copartners as LEMON & DOOLITTLE, Respondents.

[164 Pac. 1011.]

NONAPPEALABLE ORDER.

An order made by the district court, setting aside a default entered by the clerk of said court under the provisions of subd. 1, sec. 4360, Rev. Codes, and granting leave to the defendant to answer or otherwise plead, is not an appealable order under the provisions of sec. 4807, Rev. Codes.

[As to what judgments and orders are appealable, see note in 20 Am. St. 173.]

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Carl A. Davis, Judge.

Appeal from an order setting aside clerk's default. *Motion to dismiss sustained.*

Elliott & Healy, for Appellant, file no brief on motion.

Van W. Hasbrouck, for Respondents (on motion to dismiss).

The appeal is not taken from an appealable order under sec. 4807, Rev. Codes, or the amendments thereto. (Sess.

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Laws 1915, p. 193; *Maple v. Williams*, 15 Ida. 642, 98 Pac. 848; *Freeman v. Ambrose*, 12 Wash. 1, 40 Pac. 381; *Reitmeir v. Siegmund*, 13 Wash. 624, 43 Pac. 878.)

BUDGE, C. J.—This is an appeal from an order made by the district court, setting aside a default entered by the clerk of said court under the provisions of subd. 1, sec. 4360, Rev. Codes, and from the action of the trial court in giving to each of the parties “5 days to suggest death of member of partnership and ask substitution of party and defendant given 10 days thereafter to answer or to plead otherwise.”

The respondents move to dismiss the appeal taken from the above order upon the ground and for the reason that the same is not an appealable order. Sec. 4807, Rev. Codes, which specifies what judgments and orders are appealable, contains no provision providing for an appeal, either from a default entered by the clerk of a district court, or from an order of said court setting aside such default. Neither does said section provide for an appeal from any of the other matters contained in the above order. (*Maple v. Williams*, 15 Ida. 642, 98 Pac. 848; *Rose v. Leland*, 17 Cal. App. 308, 119 Pac. 532; *Reitmeir v. Siegmund*, 13 Wash. 624, 43 Pac. 878; *Sherman v. Standard Mines Co.*, 166 Cal. 524, 137 Pac. 249; *Rauer's Law & Collection Co. v. Standley*, 3 Cal. App. 44, 84 Pac. 214.)

While it is true that this court entertained an appeal from an order of the district court, setting aside a default entered by the clerk, in the case of *Leonard v. Brady*, 27 Ida. 78, 147 Pac. 284, the question as to whether or not such an order was appealable was not raised nor called to the attention of the court in that case. However, in view of the statutory provisions above noted and the decisions referred to, we have reached the conclusion that the order in question is not an appealable order. Nor does the case of *Leonard v. Brady*, *supra*, pass upon the question as to whether or not such an order is appealable.

The appeal is dismissed. Costs awarded to respondents.

Morgan and Rice JJ., concur.

Points Decided.

(April 30, 1917.)

STATE, Respondent, v. ALFRED LUNDHIGH, Appellant.

[164 Pac. 690.]

**CRIMINAL LAW—INFORMATION CHARGING MURDER—SUFFICIENCY OF—
DYING DECLARATIONS—INSTRUCTIONS.**

1. An information, the charging part of which is in the following language, to wit, that the defendant "did then and there wilfully, unlawfully, feloniously, and with malice aforethought, kill and murder one Evangelos Pappas, a human being," is sufficient to charge the crime of murder.

2. *Held*, that the dying declaration of the deceased in this case was properly admitted in evidence.

3. Under sec. 7946, Rev. Codes, written charges presented and requested by either the state or defendant are deemed excepted to, and this court may examine such charges whether assigned as error in the brief of appellant or not.

4. An instruction of the court given at the request of the state contained the following: "The jury are not to accept the evidence of the accused blindly or any further than it is corroborated by other evidence, but may consider whether it is true and given in good faith, or merely to prevent a conviction. And in considering the testimony of defendant Lundhigh, you have a right to take into account any interest he may have in the result of your verdict, as bearing upon the question of his credibility as a witness in his own behalf." *Held*, that the giving of such an instruction is error.

5. An instruction to the jury based upon sec. 7866, Rev. Codes, to the effect that if the state has proved beyond a reasonable doubt that the defendant shot and killed the deceased, and the plea of self-defense is interposed by defendant, it is incumbent upon him to establish and prove such defense by a preponderance of the evidence, is erroneous.

6. Upon a trial for murder, where the state has proved beyond a reasonable doubt the commission of a homicide by the defendant, if the commission of the homicide is admitted by the defendant, the burden of proving the circumstances in mitigation of, or that justify or excuse it, devolves upon him, unless the proof in the case tends to show that the crime only amounted to manslaughter or that the defendant was justifiable or excusable; but he is not required to establish such circumstances by a preponderance of the evidence, but only to such extent that the jury, after considering the whole evidence in the case, have a reasonable doubt as to his guilt.

[As to form and sufficiency of indictment for murder, see note in 3 Am. St. 279.]

Argument for Respondent.

APPEAL from the District Court of the Sixth Judicial District, for Bingham County. Hon. F. J. Cowen, Judge.

Defendant was convicted of murder in the second degree. Appeal from the judgment and order denying motion for new trial. *Reversed.*

Thomas & Anderson and Hansbrough & Gagon, for Appellant.

Before a legal conviction can be had, the state must have established the accused person's guilt of the crime charged by legal evidence and beyond reasonable doubt. (*State v. Seymour*, 7 Ida. 257, 61 Pac. 1033, 7 Ida. 548, 63 Pac. 1036; *State v. Marquardsen*, 7 Ida. 352, 62 Pac. 1034.)

Dying declarations are admissible only when made under the fear of impending death and after one had given up all hope of recovery. (12 Cyc. 432; 21 Cyc. 973; 4 Elliott on Evidence, sec. 3033; *State v. Gianfala*, 113 La. 463, 37 So. 30.)

This is indispensable to that sanction which the law exacts, and if it shall appear in any mode that there was a hope of recovery, however faint it may have been, still lingering in his breast, that sanction is not afforded, and his statement cannot be received. (*People v. Sanches*, 24 Cal. 17, 24; *People v. Hodgdon*, 55 Cal. 72, 36 Am. Rep. 30; *People v. Taylor*, 59 Cal. 640; *People v. Ramirez*, 73 Cal. 404, 15 Pac. 33; *People v. Fuhrig*, 127 Cal. 414, 59 Pac. 693.)

T. A. Walters, Atty. Genl., J. H. Peterson, Former Atty. Genl., Herbert Wing, Asst., C. M. Booth and R. W. Adair, for Respondent.

The amount or character of evidence necessary to create a reasonable doubt is solely for the jury to determine, and where the evidence as a whole is sufficient, the verdict will not be disturbed. (*State v. Hopkins*, 26 Ida. 741, 145 Pac. 1095; *State v. Grant*, 26 Ida. 189, 140 Pac. 959; *State v. Webb*, 6 Ida. 428, 55 Pac. 892.)

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Where the evidence is conflicting on a material issue, a new trial will not be granted. (*State v. Downing*, 23 Ida. 540, 130 Pac. 461; *State v. Collett & Ireland*, 9 Ida. 609, 75 Pac. 271; *State v. Rathbone*, 8 Ida. 161, 67 Pac. 186.)

In prosecutions for homicide, the declaration of the deceased voluntarily made while sane when in *articulo mortis*, and under the solemn conviction of approaching dissolution, concerning facts and circumstances constituting the *res gestae* of his destruction, are always admissible in evidence, provided the deceased would be a competent witness, if living. (21 Cyc. 974; *State v. Wilmbusse*, 8 Ida. 608, 70 Pac. 849; 10 Am. & Eng. Enc. Law, 2d. ed., 389; 4 Cyc., Ev., 930.)

For the court to give undue prominence in particular matters in instructions is erroneous. (12 Cyc. 649.)

All errors not prejudicial to the defendant must be disregarded. (*Territory of Neilson*, 2 Ida. 614, 23 Pac. 537; *State v. Hurst*, 4 Ida. 345, 39 Pac. 554.)

RICE, J.—In this case defendant was convicted of murder in the second degree. The charging part of the information reads as follows: "The said Alfred Lundhigh, on or about the 11th day of June, 1915, at the county of Bingham and state of Idaho, and prior to the filing of this information, did then and there wilfully, unlawfully, feloniously, and with malice aforethought, kill and murder one Evangelos Pappas, a human being." Demurrer was filed to this information, on the ground that it does not substantially conform to the requirements of sections 7677, 7678 and 7679, Rev. Codes of Idaho, and further, for the reason that it does not state facts sufficient to constitute a public offense.

This court has stated repeatedly that an indictment or information charging an offense in the language of the statute defining it is sufficient. No distinction appears to have been made in this respect between indictments or information for murder and those charging other crimes. (*People v. Butler*, 1 Ida. 231; *People v. Ah Choy*, 1 Ida. 317; *State*

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v. Ellington, 4 Ida. 529, 43 Pac. 60; *State v. Keller*, 8 Ida. 699, 70 Pac. 105.)

It is essential that an indictment or information should charge all the elements necessary to constitute the offense. Murder is defined to be the unlawful killing of a human being with malice aforethought. (Rev. Codes, sec. 6560.) The elements constituting the offense of murder are the killing of a human being, the unlawfulness of the killing and that it was accomplished with malice aforethought. I think these are the ultimate facts to be pleaded, and that the means by which and the manner in which the killing was accomplished are evidentiary facts which need not be pleaded. The information filed in this case sufficiently pleads the ultimate facts and satisfies the requirements of sections 7677, 7678, 7679 and 7686 of the Rev. Codes. (*Strickland v. State*, 19 Tex. App. 518; *People v. Cronin*, 34 Cal. 191.)

The criminal practice act of the territory of Idaho was enacted in 1864 and was taken from the statutes of California. Prior to the adoption of the California criminal practice act by the legislature of the territory of Idaho, the California courts had held as follows: "There is little or no difference between the requirements of an indictment under the common law and under our statute, except in the manner of stating the matter necessary to be contained." (*People v. Aro*, 6 Cal. 207, 65 Am. Dec. 503.) In the matter of indictments charging murder, the supreme court of California changed its position shortly after the adoption of the criminal practice act by the legislature of this territory, as shown by the cases of *People v. King*, 27 Cal. 507, 87 Am. Dec. 95, *People v. Cronin*, 34 Cal. 191, *People v. Hyndman*, 99 Cal. 1, 33 Pac. 782, and *People v. Witt*, 170 Cal. 104, 148 Pac. 928. These cases and many other California cases have uniformly held an information drawn as was the information in this case to be sufficient and in proper form. The criminal practice act of Idaho thus adopted from California was re-enacted at the time of the enactment of the Revised Statutes in 1887, and again at the time of the adoption of the Revised Codes in 1909. Under the rule usually applicable,

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the changed position of the California Supreme Court after the adoption of the statute by the legislature of this territory might be persuasive, but would not be binding upon this court. (*Cathcart v. Robinson*, 5 Pet. 264, 8 L. ed. 120.)

This court, however, prior to the re-enactment of 1887 had stated many times that an information charging a crime in the language of the statute defining that crime is sufficient. In the case of *State v. Sly*, 11 Ida. 110, 80 Pac. 1125, decided in May, 1905, this court said in effect that sec. 7675, Rev. Statutes, was evidently adopted for the purpose of abrogating the strictness of the common-law form of indictment. Again, in the same case, the court quotes with approval from the case of *People v. Murphy*, 39 Cal. 52, as follows: "The sufficiency of the indictment is not to be tested by the rules of common law, but by the requirements of the criminal practice act of this state. That act provides that the particular circumstances need not be stated, unless they are necessary to constitute the offense charged. Murder is the unlawful killing of a human being, with malice aforethought and certainly the means by which the killing is accomplished can never become material in ascertaining the offense charged. The requirement that it must appear that the party died within a year and a day is a rule of evidence merely. Unless the party died within that time the prosecution will not be permitted to show that he died of the injury received." And at page 115 of the *Sly* case this court said: "It is clear to our minds from the foregoing authorities that it has never been the intention of this court since its organization under the territorial government to the present time, to follow the doctrine laid down in the *Aro* and other early California cases in passing upon the sufficiency of an indictment or information."

Under such circumstances it is fair to presume that in the re-enactment of the Criminal Code in 1909 the legislature intended to adopt the construction which had been placed upon the statute by our own court. (*Gulf C. & S. F. Ry. v. F. W. & N. O. Ry.*, 68 Tex. 98, 2 S. W. 199, 3 S. W. 564; *State Commission in Lunacy v. Welch*, 154 Cal. 775, 99 Pac. 181; *Mitchell v. Simpson*, 25 L. R. Q. B. Div. 183.) This presump-

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tion in the case of a re-enacted statute applies not only to the decisions of courts, but also to the actions of administrative officers taken under a statute. (*Copper Queen Con. Min. Co. v. Arizona*, 206 U. S. 474, 27 Sup. Ct. 695, 51 L. ed. 1143.)

It would seem that even though some of the observations in the Sly case were *obiter dicta*, they would be entitled to as much weight as the acts of administrative officers. I think, therefore, that this court is not bound to follow the California cases decided prior to the adoption of the criminal practice act of 1864.

In the case of *State v. Smith*, 25 Ida. 541, 138 Pac. 1107, this court held that an information charging manslaughter in the following language, viz., "that the defendant did unlawfully and feloniously kill one Clara Foy," is defective and insufficient to comply with the statute because of its failure to show the means by which death was accomplished. It is possible that in cases of involuntary manslaughter, it might sometimes be necessary that the particular circumstances be alleged in order to constitute the complete offense. I think, however, that the case of *State v. Smith*, *supra*, as applied to manslaughter generally and in so far as it might be considered as an authority with reference to indictments or informations for murder, should be overruled.

The appellant assigns as error the action of the trial court in permitting witnesses Ernest Pappas and Edith Roos to testify as to dying declarations on the part of the deceased. There can be no doubt but that these dying declarations were made in the presence of approaching dissolution, and both the statements of the deceased at the time and the surrounding conditions show conclusively that the deceased was cognizant of his condition. It appears that the witness Edith Roos was testifying from her knowledge of the statements of the deceased, and not relying upon the translation of his statements made to her by an interpreter. Her testimony, as to the dying declaration of the deceased is not inadmissible within the rule laid down in the case of *State v. Fong Loon*, 29 Ida. 248, 158 Pac. 233, L. R. A. 1916F, 1198. We are of

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the opinion that the court did not err in permitting the testimony of these witnesses to be given.

Appellant in his brief failed to assign as error the giving of the instructions or any of them by the court. This court has held, in construing sec. 7946, Rev. Codes, that instructions in writing requested by the state, and given, or requested by the defendant and refused, are deemed excepted to, and the questions presented thereby need not be preserved in the bill of exceptions in order to be reviewed by the appellate court. Also that objections to instructions given by the court on its own motion must be preserved by bill of exceptions in order to be reviewed by this court. (*State v. O'Brien*, 13 Ida. 112, 88 Pac. 425; *State v. Suttles*, 13 Ida. 88, 88 Pac. 238; *State v. Peck*, 14 Ida. 712, 95 Pac. 515.) These provisions of the law, and the practices based thereon, do not appear to have been affected by the amendments to the criminal code which were enacted by the thirteenth session of the legislature, found under chapters 146, 147, 148, 149 and 150 of the 1915 Sess. Laws.

Under sec. 7946, Rev. Codes, as construed by the cases last cited, the instructions given at the request of the state are before the court for review, exceptions thereto having been preserved by law. This court will not assume the burden of searching the record for errors not assigned by the appellant, but in this case certain instructions given at the request of the state have come to our attention. Among them are instructions Nos. 62 and 65, which read as follows:

"Instruction No. 62. The jury are further instructed in the language of the statutes of this state that upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof in the case tends to show what the crime committed only amounts to manslaughter or that the defendant was justifiable or excusable. So, in this case, if the state has proved beyond a reasonable doubt that the defendant, Lundhigh, shot and killed the deceased Pappas, the plea of self-defense interposed by the defendant must establish and

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prove such defense by a preponderance of the evidence. So if you find from the evidence, beyond a reasonable doubt, that the defendant has failed by a preponderance of the evidence to establish and prove such defense, it will then be your duty to convict the defendant."

"Instruction No. 65. The court instructs the jury that the law says that the defendant is a competent witness and may testify in his own behalf, and the jury should not capriciously disregard such testimony. This does not mean that you should believe, but only that you should consider it and ascertain to the best of your judgment whether it is true, and if true you should act on it, and if you should not believe it you should reject such testimony, you being the sole judges of the truth of the evidence. The jury are not to accept the evidence of the accused blindly or any further than it is corroborated by other evidence, but may consider whether it is true and given in good faith, or merely to prevent a conviction. And in considering the testimony of the defendant Lundhigh, you have a right to take into account any interest he may have in the result of your verdict, as bearing upon the question of his credibility as a witness in his own behalf."

In this case the killing was admitted by the defendant, and the only issue in the case was that arising from appellant's claim that he acted in self-defense. The only evidence of the immediate circumstances surrounding the killing is that contained in the dying declaration of the deceased and the testimony of appellant. Appellant's narrative of those events is not impossible or incredible. The two instructions quoted therefore, bear directly upon the proof required on the part of the appellant to justify the killing of the deceased on the ground of self-defense, and go to the very foundation of his defense. They are both erroneous. (*Coffin v. United States*, 156 U. S. 432, at pp. 459, 460, 15 Sup. Ct. 394, 39 L. ed. 481, at p. 494.)

By instruction No. 62 the jurors are told that the defendant must establish and prove the plea of self-defense by a preponderance of the evidence, and that if they find from the evidence beyond a reasonable doubt that the defendant

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has failed by a preponderance of the evidence to establish and prove such defense, it will be their duty to convict the defendant. This instruction does not state the law. Sec. 7866, Rev. Codes, is as follows: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof in the case tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." While the burden of proving the circumstances in mitigation or justification of the homicide rests with the defendant, he is not required to establish such circumstances by a preponderance of the evidence, but to establish the circumstances to such an extent that the jury, after considering the whole evidence in the case, have a reasonable doubt as to his guilt. (*State v. Rogers, ante*, p. 259, 163 Pac. 912; *People v. Bushton*, 80 Cal. 160, 22 Pac. 127, 549; *People v. Elliott*, 80 Cal. 296, 22 Pac. 207; *Davis v. United States*, 160 U. S. 469, 16 Sup. Ct. 353, 40 L. ed. 499.)

By instruction No. 65 the jurors are instructed not to consider the testimony of the accused any further than it is corroborated by other evidence. We do not understand that this is the law as applied to the testimony of a defendant in a criminal case. The defendant is entitled to the same consideration as a witness as the other witnesses in the case, and his credibility is to be tested by the same rules as are applicable to other witnesses. This latter instruction is also subject to the criticism which was applied to a similar instruction in the case of *State v. Rogers, ante*, p. 259, 163 Pac. 912, in that it singles out the defendant and directs the jury to apply tests as to his credibility as a witness differing from those applied to other witnesses in the case.

For these errors the judgment of the district court must be reversed. The cause is remanded, with directions to the trial court to grant the appellant a new trial.

BUDGE, C. J., Concurring in Part and Dissenting in Part.
I concur in the opinion of Justice Rice that the information

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is sufficient to charge the crime of murder. It will be conceded that under the common law the information would be fatally defective. (*People v. Aro*, 6 Cal. 207, 65 Am. Dec. 503; *People v. Lloyd*, 9 Cal. 54; *People v. Wallace*, 9 Cal. 30; *People v. Cox*, 9 Cal. 32; *People v. Steventon*, 9 Cal. 273; *People v. Coleman*, 10 Cal. 334; *People v. Dolan*, 9 Cal. 576; *People v. Judd*, 10 Cal. 313; *People v. Miller*, 12 Cal. 291.)

Beginning, however, with the case of *People v. King*, 27 Cal. 507, 87 Am. Dec. 95, the supreme court of California changed its former holding and held that:

“In an indictment for murder it is not necessary to aver the means by which the homicide was committed or the nature and extent of the wound, or the part of the body upon which it was inflicted.”

And in the case of *People v. Cronin*, 34 Cal. 191, that court further held that an indictment need not aver the means or mode of death. (*People v. Hyndman*, 99 Cal. 1, 33 Pac. 782.)

In the case of *People v. Witt*, 170 Cal. 104, 148 Pac. 928, the supreme court of California, in discussing the sufficiency of an information, the charging part of which, with the exception of the name of the defendant and the date upon which the murder was committed, is the same as in the case at bar, says:

“Concededly, this describes the offense of murder in the language of our statute. . . . Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case.”

The Witt case cites the case of *People v. Soto*, 63 Cal. 165, with approval, wherein it is held that an information in the language of the statute defining murder is sufficient to charge murder. The Idaho cases generally have used the same expression. (*Matter of McLeod*, 23 Ida. 257, 128 Pac. 1106, 43 L. R. A., N. S., 1813; *State v. O'Neil*, 24 Ida. 582, 135 Pac. 60; *State v. Brill*, 21 Ida. 269, 121 Pac. 79; *State v. Sly*, 11 Ida. 110, 80 Pac. 1125; *State v. Keller*, 8 Ida. 699, 70 Pac.

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1051; *State v. Ellington*, 4 Ida. 529, 43 Pac. 60; *People v. Ah Choy*, 1 Ida. 317; *People v. Butler*, 1 Ida. 231.)

The early California cases, cited above, were decided by the supreme court of that state prior to the adoption of the California criminal practice act by the legislature of the territory of Idaho, in 1864, and ordinarily would be regarded as binding upon this court in the construction of the statute. However, in the matter of sufficiency of indictments for murder the California court changed its position shortly after the adoption of the criminal practice act by the legislature of the territory of Idaho as shown by the cases of *People v. King*, *supra*; *People v. Cronin*, *supra*; *People v. Hyndman*, *supra*; *People v. Witt*, *supra*; and many other cases not here mentioned.

While it is true, as a general rule, that where one state adopts a statute from another state, it also adopts the decisions of that state, construing the statute, an exception to the rule seems to obtain where the courts of the state from which the statute was borrowed have repudiated or abandoned such construction. The Colorado court states the rule as follows:

“The rule that courts are bound to adopt the prior judicial construction given a borrowed statute in the state from which it is taken is not inflexible. Where such construction was clearly erroneous, harsh and oppressive, or where it is inconsistent with the spirit and policy of the laws of the state borrowing the statute, courts may, and frequently do, decline to follow it. It can hardly be seriously contended that the rule should control in a case like the one at bar, where the supreme court has repudiated and abandoned its own construction.” (*Dwyer v. Smelter City State Bank*, 30 Colo. 315, 70 Pac. 323; *Oleson v. Wilson*, 20 Mont. 544, 63 Am. St. 639, 52 Pac. 372; *Coad v. Cowhick*, 9 Wyo. 316, 87 Am. St. 953, 63 Pac. 584; 2 Lewis’ Sutherland Stat. Con., sec. 404.)

From the foregoing it would seem that this court is not bound to follow the earlier California cases prescribing the essential elements of an indictment for murder, but is at liberty to fol-

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low the later California cases and the rule hitherto announced by this court.

Informations charging murder in manner and form as alleged in this case have been held to be sufficient under statutes the same or similar to ours in the following cases: *Molina v. Territory*, 12 Ariz. 14, 95 Pac. 102; *State v. Nielson*, 38 Mont. 451, 100 Pac. 229; *State v. Hayes*, 38 Mont. 219, 99 Pac. 434; *Strickland v. State*, 19 Tex. App. 518; note to *Shaffer v. State*, 3 Am. St. 281.

I have examined with care the case of *State v. Smith*, 25 Ida. 541, 138 Pac. 1107, and do not hesitate to state, that in my opinion it does not correctly state the law governing the sufficiency of an information or indictment charging murder; that it is not supported by the great weight of modern authority, or supported as authority in testing the point raised in the instant case; that it cannot be so considered in the light of the authorities considered in this opinion, nor under the plain construction and interpretation of our statute, nor with due regard to the proper, certain and efficient administration of the law, and in so far as the rule there announced might be regarded as a precedent in testing the sufficiency of an information or indictment charging murder, the case should be overruled.

I dissent from that portion of the opinion which discusses the alleged erroneous instructions and upon which this case is reversed. There is no assignment of error in appellant's brief predicated upon the giving of either of these instructions. There is no specification of error based thereon in the transcript or bill of exceptions. The point was not urged upon appellant's motion for a new trial, nor was it urged upon the oral argument before this court. On the contrary, it affirmatively appears on page 31 of the appellant's brief that there never was any intention on the part of appellant to predicate error upon the giving of any instructions. I quote from appellant's brief as follows:

"The court instructed the jury fully on all of these matters and there was no objection to the instructions of the

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court on either side, it being conceded and agreed that they were correct and proper. . . .” (Italics ours.)

This court has uniformly adhered to the rule that where errors are not assigned, they will not be reviewed. And it is further well settled that even where errors are assigned, if they are not discussed either in the brief or upon oral argument and no authorities are cited in support of the assignments, they will neither be reviewed, considered nor discussed by this court. (*Farnsworth v. Pepper*, 27 Ida. 159, 148 Pac. 48; *Davenport v. Burke*, 27 Ida. 464, 149 Pac. 511; *State v. McGann*, 8 Ida. 40, 66 Pac. 823; *State v. Wetter*, 11 Ida. 433, 83 Pac. 341; *State v. Jones*, 28 Ida. 428, 154 Pac. 378. See, also, *Rice v. People*, 55 Colo. 506, 136 Pac. 74; *People v. Stein*, 23 Cal. App. 108, 137 Pac. 271; *People v. Valencia*, 27 Cal. App. 407, 150 Pac. 68; *State v. Kakarikos*, 45 Utah, 470, 146 Pac. 750; 12 Cyc. 875.)

Under such circumstances I cannot bring myself to believe that it is proper for this court to assign and discuss errors for an appellant which he expressly waived, abandoned and failed to assign as error. I find no precedents in our decisions in support of such procedure. The presumption is that if the errors had been called to the attention of the trial court, they would have been corrected before the instructions were given. A defendant in a criminal case ought not to be permitted to sit idly by while prejudicial error is being committed and speculate upon the result of the verdict. (*State v. Baker*, 28 Ida. 727, 156 Pac. 103.)

Where the evidence in a given case clearly shows the defendant to be guilty of an unprovoked murder, without any justification or excuse, and the jury could not, under their oaths, have brought in any other verdict than was rendered by them, even conceding that there is error in the instructions, and the right of the appellate court to review such errors when not assigned, the judgment of the trial court should not be reversed, for the reasons as announced in an opinion by the late Justice Stewart, in the case of *State v. Marren*, 17 Ida. 766-790, 107 Pac. 993, 1001:

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“Although the instruction referred to contains matter which should not have been given to the jury, we are, however, of the opinion that the appellant could have been in no way prejudiced by the giving of such instruction. Other instructions were given to which no exception was taken, which clearly charged the jury with reference to circumstantial evidence; and not only that, but the evidence in this case is so clear and convincing of the guilt of the appellant that the jury could in no possible manner have been influenced to return a verdict of guilty by the objectionable matter contained in this instruction; and from the evidence, the jury could not, without a violation of their oaths, fail to have found the defendant guilty, and because of this, the defendant could not have been prejudiced by the giving of such instruction.

“Rev. Codes, sec. 8070, admonishes this court: ‘After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties.’ And again, Rev. Codes, sec. 8236: ‘Neither a departure from the form or mode described by this code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice in respect to a substantial right.’ The substance of these statutory provisions is that a new trial ought never to be granted, notwithstanding some mistake or even misdirection by the judge, provided the revisioning court is satisfied that justice has been done and that upon the evidence no other verdict could possibly have been found. [Citing cases.]”

In *State v. Silva*, 21. Ida. 247-257, 120 Pac. 835-839, it is said: “That if the evidence of the defendant’s guilt is satisfactory, that is, such as ordinarily produces a conviction in an unprejudiced mind, beyond a reasonable doubt, and the result could not have been different had the instruction been omitted, the case would not be reversed because of such erroneous instruction.”

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In *State v. Brill*, 21 Ida. 269-275, 121 Pac. 79, 80, this court says: "That even though an instruction is erroneous and ordinarily the error would be material, yet if the evidence of the defendant's guilt is satisfactory, that is, such as ordinarily produces moral certainty, or conviction in an unprejudiced mind, and the result would not have been different had the instruction been omitted, the case will not be reversed because of such erroneous instruction."

The judgment of the trial court should be affirmed.

MORGAN, J., Concurring in Part.—I concur in all of the foregoing opinion except that portion holding the information to be sufficient,—from that portion I dissent.

While this court has repeatedly stated, in effect, that an indictment or information is sufficient which charges an offense in the language of the statute defining it, I believe that in doing so it has inadvertently fallen a little short of correctly stating a sound principle of law rather than that it has deliberately attempted to announce a new rule of pleading in criminal cases. It is said in 22 Cyc. 339: "Although the rule is frequently stated to be that it is sufficient to charge a statutory offense in the language of the statute creating it, such rule is accurate only in those cases in which the statute defines and describes the offense, and is better stated with such qualification. The words of the statute must fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished, and must state all the material facts and circumstances embraced in the definition of the offense. . . ."

"The same certainty is required in indictments on statutes as at common law, and where the statute does not define the act or acts constituting the offense so as to give the offender information of the nature and cause of the accusation, other averments conveying such information must be added, even when the offense is not capital. The indictment must also be framed with such certainty that a judgment may be pleaded in bar to any subsequent prosecution for the same offense."

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The territory of Idaho, in 1864, adopted the criminal practice act of California, which had been enacted by the legislature of that state in 1851. According to a well-established rule of statutory construction our legislature is held to have enacted this law with full knowledge of the interpretation which the supreme court of that state had placed upon it and with the intent that it be so construed here. Of course any interpretation placed upon the law by the California court subsequent to the date of its enactment by the legislature of Idaho would not, if contradictory of its former decisions, have any binding effect upon this court.

The act of the territorial legislature of 1864, above referred to, has been re-enacted in the state of Idaho, and the part thereof by which the sufficiency of this information must be tested is to be found in secs. 7677, 7678, 7679, 7686 and 7687, Rev. Codes, the language of which is practically identical with sections 237, 238, 239, 246 and 247 of the California criminal practice act of 1851.

Sec. 7677 provides: "The indictment (or information) must contain

"2. A statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended."

The following form is provided in sec. 7678:

"The State of Idaho against A. B., in the District Court of the — Judicial District, in the County of —, — Term, A. D., nineteen —:

"A. B. is accused by the grand jury of the County of — by this indictment, of the crime of (giving its legal appellation, such as murder, arson, or the like), committed as follows:

"The said A. B., on the — day of —, A. D. nineteen —, at the County of —, (here set forth the act or omission charged as an offense)."

Sec. 7679 is: "It must be direct and certain as regards:

"1. The party charged;

"2. The offense charged;

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"3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense."

Sec. 7686 is, in part, as follows: "The indictment (or information) is sufficient if it can be understood therefrom: . . .

"6. That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended;

"7. That the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment upon conviction, according to the right of the case"; and sec. 7687 is as follows: "No indictment (or information) is sufficient, nor can the trial, judgment or other proceeding thereon, be affected, by reason of any defect or imperfection in matter of form, which does not tend to the prejudice of a substantial right of the defendant upon its merits."

The supreme court of California construed the criminal practice act of that state, as applied to homicide cases, prior to its adoption as the law of the territory of Idaho, in the cases of *People v. Aro*, 6 Cal. 208, 65 Am. Dec. 503, decided in 1856; *People v. Wallace*, 9 Cal. 31; *People v. Cox*, 9 Cal. 33; *People v. Lloyd*, 9 Cal. 55; *People v. Steventon*, 9 Cal. 274; *People v. Dolan*, 9 Cal. 576; *People v. Judd*, 10 Cal. 314; *People v. Coleman*, 10 Cal. 334, all decided in 1858, and *People v. Miller*, 12 Cal. 291, decided in 1859.

In these cases the court held, in effect, that the California legislation upon the subject, while intended to remove the useless technicalities in criminal pleading which had encumbered the common law and had frequently resulted in defeating the ends of justice, had wrought no material change in the requirements of an indictment except in the manner of stating the matter still recognized as necessary to be therein contained; that the necessity for a statement of the facts and circumstances constituting the offense still existed and was "recognized by the 237th section of the statute, which provides that the indictment shall contain 'a statement of the acts constituting the offense, etc.,' as well as the precedent

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given in the statute which points out how such facts shall be charged." That in indictments for murder a statement of the manner of the death and the means by which it was produced was necessary, so that the defendant might know of what crime he was accused and be enabled to prepare his defense on the facts; also in order that the jury might be warranted in its finding, the court in its judgment, and the defendant be enabled to successfully plead a former conviction or acquittal in the event of his being again prosecuted for the same act. With this construction in view our legislature enacted the law above quoted and, as above indicated, these decisions should have more than persuasive influence upon us in construing the law under consideration, for they are declaratory of the intent of our legislature in enacting it.

In the year 1865, after the legislature of the territory of Idaho had adopted the criminal practice act, the supreme court of California decided the case of *People v. King*, 27 Cal. 507, 87 Am. Dec. 95, referred to in the foregoing opinions, which has since been frequently cited as an authority by that and some other courts. A part of the opinion in that case, often quoted, is as follows: "If the defendant is guilty, he stands in need of no information to be derived from a perusal of the indictment, as to the means used by him in committing the act or the manner in which it was done, for as to both his own knowledge is quite as reliable as any statements contained in the indictment. If he is not guilty, the information could not aid in the preparation of his defense."

Following the *King* case the supreme court of California has held accusations like the one here under consideration to be sufficient (*People v. Murphy*, 39 Cal. 52; *People v. Weaver*, 47 Cal. 106; *People v. Alviso*, 55 Cal. 230; *People v. Hong Ah Duck*, 61 Cal. 387; *People v. Hyndman*, 99 Cal. 1, 33 Pac. 782; *People v. Delhantie*, 153 Cal. 461, 125 Pac. 1066), as has also the courts of Montana and Arizona. (*Molina v. Territory*, 12 Ariz. 14, 95 Pac. 102; *State v. Hayes*, 38 Mont. 219, 99 Pac. 434; *State v. Nielson*, 38 Mont. 451, 100 Pac. 229; *Marquez v. Territory*, 13 Ariz. 135, 108 Pac. 258.)

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That one guilty of murder is possessed of knowledge of the means whereby the crime was committed, and stands in no need of being further informed upon that subject is quite clear; that one accused, and innocent, of murder, which may be committed by any means which the ingenuity of man can devise, could and should be aided, in the preparation of his defense, by the indictment, or information, the only means provided by law whereby he is to be apprised of the acts constituting the crime which he must be prepared to meet when placed upon his trial, is equally clear. No justification has been offered for the assertion that if the accused is not guilty, the allegation of a properly worded indictment, or information, could not aid in the preparation of his defense, and it may be stated with confidence none exists.

By the information in this case appellant had notice that the state would attempt to prove he did, on or about the 11th day of June, 1915, or some time prior thereto, somewhere in Bingham county, by some means, murder the deceased. If the crime of murder is sufficiently charged, it might have been shown at the trial that appellant either shot, stabbed, strangled, drowned, starved or poisoned the deceased, or produced his death in any one or more of many other ways, but just what method of killing the state would rely upon and appellant must be prepared to defend against is not disclosed, nor can it be ascertained therefrom whether proof would be adduced tending to show that the murder was committed in the perpetration or attempt to perpetrate, arson, rape, robbery, burglary or mayhem, or whether appellant would be called upon to rebut proof that he personally committed the act which produced the death, or that he aided and abetted in its commission. If this information is sufficient, it would, with a change of names, dates and places, accuse Cain of having produced the death of Abel with the same impartial uncertainty with which it would, with like changes, charge every murder committed since that first homicide.

It is urged by counsel for respondent that the testimony shows the appellant killed deceased and sought to justify his act upon the ground of self-defense; that therefore he stood

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in no need of being informed by the pleading of the means whereby, and the manner in which, the homicide occurred, and that none of his substantial rights were invaded by the failure to more fully allege these facts. At the time the trial judge ruled upon the demurrer no testimony had been introduced, and the evidence cannot be read in aid of the information upon appeal, when its sufficiency has been called in question by demurrer. Appellant was entitled to, and should have been accorded, the benefit of a presumption of innocence, and of ignorance of the means by which and the manner in which the alleged crime was claimed to have been committed, and the prosecuting attorney should have been required to charge him in such language as to apprise him of what he must be prepared to meet, and with sufficient definiteness and certainty to enable him, in case another proceeding should be taken against him for the same offense, to plead a former conviction or acquittal. (*State v. Lottridge*, 29 Ida. 53, 155 Pac. 487.)

Decisions to the effect that one, presumably innocent, may be locked in a prison cell, be informed that he is accused of the murder of a person named, in a certain county and on or about a time stated; that he may thereafter be placed upon his trial and receive his first intimation when witnesses are produced who testify against him, as to the means by which and the manner in which he is accused of having committed the act for which his life is sought to be forfeited, are sadly out of harmony with the American idea of justice.

In *State v. Smith*, 25 Ida. 541, 138 Pac. 1107, the defendant was accused of manslaughter in the following language: "That the said defendant, Charles C. Smith, at the time and place aforesaid, did unlawfully and feloniously kill one Clara F. Foy, a human being; contrary to the form of the statute in such case made and provided." This court, holding that accusation to be insufficient, said: "To simply charge that a person committed murder or larceny merely charges the name of the offense. That alone is not sufficient. It is necessary to in some way inform the party accused as to how it is claimed he committed murder, whether by shooting, by strik-

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ing a blow, by drowning, poisoning, or in some other manner perpetrating the offense; or, if he committed larceny, what property he took." The court further stated: "A defendant before being placed upon trial for his life or liberty is entitled to be apprised not only of the *name of the offense* with which he is charged, but, in general terms, of the *manner* in which he is charged with having committed the offense. The statute is plain and explicit in this respect."

That opinion correctly states the law applicable to that case and this one, and I regret to see it overruled.

The weight of the opinion of this court in *State v. Sly*, 11 Ida. 110, 80 Pac. 1125, as an authority in this case, may best be tested by comparing that information with the one here under consideration. The charging part of the information in this case is to be found in the foregoing opinion of Mr. Justice Rice. In the *Sly* case it is as follows:

"That the said Lorenzo Payne Sly, in the county of Latah, state of Idaho, on the twenty-seventh day of January, A. D. 1904, then and there being, did then and there wilfully, unlawfully and feloniously and of his deliberately premeditated malice aforethought, kill and murder one John H. Hays, a human being, by then and there wilfully, unlawfully and feloniously, and of his deliberately premeditated malice aforethought, shooting at and against the body and person of the said John H. Hays, with a certain gun then and there loaded with gunpowder and leaden bullet, and which said gun he the said Lorenzo Payne Sly, then and there held in his hands."

While it is true this court, in that case, gave expression to the *obiter dicta* quoted and relied upon in the foregoing opinion of Mr. Justice Rice, in view of the manifest sufficiency of that information, the case ought not to be relied upon to sustain an accusation which is manifestly insufficient.

The supreme court of Kentucky, in case of *White v. Commonwealth*, 9 Bush (Ky.), 178, having under consideration an indictment, the charging part of which is almost identical with that of the information in this case, and construing the provisions of the Kentucky Code relative thereto, which are quite similar to our law upon the subject, held the accusation to be

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insufficient, and that an indictment ought to charge the accused with a particular offense by properly specifying the facts constituting it. (See, also, *Edwards v. State*, 27 Ark. 493; *Guedel v. People*, 43 Ill. 226; *Shepherd v. State*, 54 Ind. 25; *Arrington v. Commonwealth of Virginia*, 87 Va. 96, 12 S. E. 224, 10 L. R. A. 242.)

Sec. 8070, Rev. Codes, quoted in *State v. Marren*, 17 Ida. 766-790, 107 Pac. 993, wherein it is sought to direct this court as to what it shall consider and what it shall disregard when passing upon appeals in criminal cases, is clearly violative of sec. 13, art. 5, of the constitution, which provides: "The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government; but the legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the supreme court, so far as the same may be done without conflict with this constitution." Furthermore, the right to trial by jury, mentioned in sec. 7, art. 1 of the constitution, means a trial free from prejudicial error by a jury which has not been misdirected by the court as to the law governing the case. Such a trial is guaranteed alike to the innocent and the guilty, and it is not within the province of this court to condemn a man who has not been properly convicted by a tribunal having jurisdiction to determine the facts.

Quotations from the cases of *State v. Marren*, *supra*, *State v. Silva*, 21 Ida. 247-257, 120 Pac. 835, and *State v. Brill*, 21 Ida. 269-275, 121 Pac. 79, have no proper place here. In each of those cases the judgment of conviction was affirmed, so probably no real harm resulted from the observations of the court relative to the guilt of the defendants. However, had the cases been reversed and new trials ordered, and had the court indulged in discussions having a tendency to prejudice the minds of prospective jurors against the defendants, and thus to deprive them of fair and impartial trials, we would have searched in vain for an excuse for its conduct.

Argument for Plaintiff.

(May 3, 1917.)

In re Application of W. H. BAUGH, for Writ of Habeas Corpus.

[164 Pac. 529.]

WRIT OF HABEAS CORPUS—PRELIMINARY EXAMINATION—SUFFICIENCY OF EVIDENCE—INTOXICATING LIQUOR—POSSESSION.

1. Under the provisions of sec. 8354, Rev. Codes, upon petition for a writ of *habeas corpus* this court may examine the evidence upon which the order of commitment was based to determine whether or not there was probable cause to believe, first, that the crime charged has been committed; second, that the party held to answer has committed it.

2. Where the evidence taken at the preliminary hearing of one accused of having intoxicating liquor in his possession, contrary to law, shows that the accused owned a drug-store and building in which the same was situated, and that during his temporary absence therefrom certain parties entered the store with a satchel containing intoxicating liquor, that the sheriff entered immediately afterward and confiscated and removed the liquor, and there is no evidence showing that it was brought upon the premises with the knowledge or consent of the accused, there was not probable cause for holding him to answer.

[As to release of prisoner under *habeas corpus* after commitment and before trial, see note in 100 Am. St. 29.]

APPLICATION for Writ of Habeas Corpus. Writ issued and hearing had on return thereto. Petitioner discharged.

Paul S. Haddock, for Plaintiff.

"This court cannot weigh the evidence on *habeas corpus*, but if it wholly fails to disclose a public offense for which the prisoner may be held, on preliminary examination, then the petitioner should be entitled to his discharge." (*In re Heigho*, 18 Ida. 566, Ann. Cas. 1912A, 138, 110 Pac. 1029, 32 L. R. A., N. S., 877; *In re Knudtson*, 10 Ida. 676, 79 Pac. 641; *Ex parte Sternes*, 82 Cal. 245, 23 Pac. 38.)

The possession intended to be prohibited is a criminal one, or a possession with criminal intent. (*People v. White*, 34

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Cal. 183; *People v. Curran*, 3 Cal. Unrep. 643, 31 Pac. 1116; *Van Straaten v. People*, 26 Colo. 184, 56 Pac. 905; *People v. Hurley*, 60 Cal. 74, 44 Am. Rep. 55.)

Harlan D. Heist and Frank T. Disney, for Defendant.

"It is not necessary for a committing magistrate to be convinced beyond a reasonable doubt that one accused of crime is guilty thereof, but if from all the evidence he has reasonable or probable cause to believe and does believe that the accused is guilty, it is his duty to hold him for trial." (*State v. Layman*, 22 Ida. 387, 125 Pac. 1042; *State v. Bond*, 12 Ida. 424, 86 Pac. 43.)

The application for writ of *habeas corpus* should be denied where it is not shown that the committing magistrate has abused the discretion which the law vests in him. (*In re Squires*, 13 Ida. 624, 92 Pac. 754; *In re Levy*, 8 Ida. 53, 66 Pac. 806.)

"Intent is not an ingredient of the statutory offense of violation of the liquor laws of the land, and for this reason it cannot be set up as a defense that the accused did not authorize or direct the act that was done by the agent, had no personal knowledge of the act at the time, or was free from any intent to violate these laws." (2 Wharton's Criminal Law, sec. 1844, and cases cited; *State v. Kittele*, 110 N. C. 560, 28 Am. St. 698, 15 S. E. 103, 15 L. R. A. 694; *State v. Gilmore*, 80 Vt. 514, 13 Ann. Cas. 321, 68 Atl. 658, 16 L. R. A., N. S., 786; *State v. Chastain*, 19 Or. 176, 23 Pac. 963; *People v. Curtis*, 129 Mich. 1, 95 Am. St. 404, 87 N. W. 1040; *United States v. Stofello*, 8 Ariz. 461, 76 Pac. 611.)

MORGAN, J.—W. H. Baugh, the petitioner herein, and A. M. Brickey, Jake Rolfson, Sam Adams and A. W. Gregor were arrested upon a charge of having intoxicating liquor in their possession, contrary to law, in Lincoln county. A preliminary examination was had before the probate judge of that county, sitting as a committing magistrate, which resulted in petitioner being held to answer to said charge in the district court. He gave bond for his appearance, was after-

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ward surrendered to the sheriff by his bondsmen, and petitioned this court for and procured the issuance of a writ of *habeas corpus*, directed to that officer, commanding him to bring petitioner before the court that the cause of his detention might be inquired into. The sheriff's return to the writ shows that he holds petitioner in custody pursuant to the proceedings above described and by reason of his surrender by the sureties on his bond. The question presented here is: Does the evidence taken at the preliminary examination justify the action of the magistrate in holding petitioner to answer?

Sec. 7578, Rev. Codes, relating to preliminary examinations, provides: "If, after hearing the proofs, it appears either that no public offense has been committed or that there is not sufficient cause to believe the defendant guilty of a public offense, the magistrate must order the defendant to be discharged. . . . "

It is well established that, upon petition for a writ of *habeas corpus*, the court can go back of the order of commitment by a magistrate and inquire into the question of probable cause. Sec. 8354, Rev. Codes, referring to the writ of *habeas corpus*, provides: "If it appears on a return of the writ that the prisoner is in custody by virtue of process from any court of this state, or judge or officer thereof, such prisoner may be discharged in any of the following cases, subject to the restrictions of the last section: . . . 7. Where a party has been committed on a criminal charge without reasonable or probable cause." (See, also, *In re Heigho*, 18 Ida. 566, Ann. Cas. 1912A, 138, 110 Pac. 1029, 32 L. R. A., N. S., 877; *In re Knudtson*, 10 Ida. 676, 79 Pac. 641; *Ex parte Sternes*, 82 Cal. 245, 23 Pac. 38; *In re Snell*, 31 Minn. 110, 16 N. W. 692; *Ex parte Beville*, 6 Okl. Cr. 145, 117 Pac. 725; *People v. Moss*, 187 N. Y. 410, 10 Ann. Cas. 309, 80 N. E. 383, 11 L. R. A., N. S., 528.)

In *habeas corpus* proceedings the sufficiency of the evidence to justify a verdict or the submission of the case to the jury will not be inquired into. The writ cannot be so used as to exercise the functions of an appeal, but the court may inquire into and examine the proofs submitted at a preliminary hear-

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ing to see whether or not, first, there is any evidence tending to show that a public offense has been committed; second, there was cause to believe the accused committed it. (*State v. Beaverstad*, 12 N. D. 527, 97 N. W. 548; *State v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.)

The testimony taken at the preliminary examination was reduced to writing and is here for our consideration. It appears therefrom that petitioner is a physician and surgeon, residing at Shoshone in Lincoln county; that he owns a drug-store and the building in which it is situated, and that the second story of the store building is conducted as a lodging-house.

The evidence introduced on behalf of the state consists, in addition to certain exhibits, of the testimony of the sheriff who testified that on February 18, 1917, at about 11:30 P. M., he saw Brickey and Rolfson cross the railroad tracks coming from train No. 17, which is one of the main line west-bound passenger trains of the Oregon Short Line Railroad Company, and they had in their possession a satchel; that they went directly to and into petitioner's drug-store. The sheriff entered the store immediately after Brickey and Rolfson and found therein, in addition to the two men last named, Gregor and Adams, the latter being employed as a clerk in the store. The officer asked where the satchel was, to which Rolfson replied that he didn't know anything about a satchel. The sheriff then stated that he had seen them bring it into the store and that he was going to get it. He asked Brickey where it was and he replied that he didn't know anything about it. Adams, however, pointed out the satchel to him and he took it into his possession. He afterward broke open the satchel and found twelve quarts of whisky in it. It further appears from the sheriff's testimony that he did not see the petitioner during that evening, although he was both upstairs and downstairs in the store building.

From the testimony of petitioner, which was taken at the preliminary examination and which is uncontradicted, it appears that on the evening of the occurrences above mentioned he received instructions from the Oregon Short Line Railroad

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Company, of which company he was assistant surgeon, to visit certain patients out of town, and that he left Shoshone for that purpose on a freight train about a quarter past 11 o'clock that evening, and did not return until about 5 o'clock next morning; that he left Adams in the store at the desk writing a letter and that he had no knowledge whatever of the acts of Rolfson, Gregor or Brickey that evening. Petitioner further testified that he had no knowledge about the valise or its contents or as to where they came from except from hearsay. It appears from the testimony of Adams, and it is uncontradicted, that when Brickey and Rolfson came to the drug-store the former applied for a room and that he directed him upstairs where he later procured lodgings.

The proceedings before the committing magistrate was commenced pursuant to chap. 11, Sess. Laws 1915, p. 41, sec. 2 of which provides: "It shall be unlawful for any person to have in his possession any intoxicating liquor. . . . " That law has been fully discussed and construed by this court in *In re Application of Crane for a Writ of Habeas Corpus*, 27 Ida. 671, 151 Pac. 1006.

The evidence introduced at the preliminary examination clearly shows that the crime of having intoxicating liquor in his possession has been committed by someone, but absolutely fails to connect the petitioner with the offense, except that he owned the building into which it was carried without his knowledge or consent. If this may be deemed to be even constructive possession, which is doubtful under the circumstances disclosed by the record before us, it clearly is not such a possession as is contemplated by the law of 1915, *supra*. That law clearly contemplates that the possession of intoxicating liquor, in order to be a crime, must be had knowingly or at least by the connivance or with the consent of the possessor. It is not to be understood that it may be violated accidentally, inadvertently or innocently, but if violated at all, it must be done, as charged in the criminal complaint in this case, knowingly, intentionally and unlawfully. Sec. 6314, Rev. Codes, provides: "In every crime or public offense there must exist a union, or joint operation, of act and intent, or

Points Decided.

criminal negligence." (*State v. Omaechevviaria*, 27 Ida. 797, 152 Pac. 280.)

The prayer of the petition is granted and the sheriff of Lincoln county is directed to discharge the petitioner from custody.

Budge, C. J., and Rice, J., concur.

(May 3, 1917.)

D. W. LONG and A. W. LONG, Respondents, v. BURLEY
STATE BANK, a Corporation, Appellant.

[165 Pac. 1119.]

**ATTACHMENT—LEVY—DAMAGES—LOSS OF PROFITS—MALICE—PROBABLE
CAUSE.**

1. Before recovery can be had because of an attachment procured wrongfully, maliciously and without probable cause, it must be shown that the property alleged to have been attached was actually levied upon in substantial conformity with sec. 4307, Rev. Codes (amended, Sess. Laws 1911, chap. 162, p. 559).

2. Loss of profits in business is an element of damage where the attachment was procured with malice and without probable cause, but may be recovered only upon the production of such evidence as will enable the jury to calculate, with a reasonable degree of certainty, the amount of damage resulting from such loss.

3. Malice and want of probable cause, if relied upon as an element of damage, must be alleged and proved. The jury may infer malice from the want of probable cause, but it may not infer want of probable cause alone from the fact that the suit in aid of which the attachment issued was decided against the party procuring it.

[As to what is abuse of attachment, and the liability therefor, see note in 86 Am. St. 400.]

APPEAL from the District Court of the Fourth Judicial District, for Cassia County. Hon. Edward A. Walters, Judge.

Argument for Appellant.

Action to recover damages for procuring an attachment wrongfully, maliciously and without probable cause. Judgment for plaintiffs. *Reversed.*

J. C. Rogers and T. Bailey Lee, for Appellant.

One cannot set up the volume of business done by others to establish the amount that he himself might or would have done. (*O'Grady v. Julian*, 34 Ala. 88; *Smith v. Eubanks*, 72 Ga. 280.)

At no time did plaintiffs show that this attachment prevented them from completing any work by them undertaken. They did not seek to show what profits they would have made, but endeavored to speculate upon what they might have made. Such hoped-for profits are too remote and speculative to be considered as proper elements of damage. (2 Greenleaf on Evidence, pars. 256-261; *Barnes v. Berendes*, 139 Cal. 32, 69 Pac. 491, 72 Pac. 407; *Pacific Steam W. Co. v. Alaska etc. Assn.*, 138 Cal. 632, 72 Pac. 161; *Beck v. West*, 87 Ala. 213, 216, 6 So. 70; *Howard v. Stillwell etc. Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. ed. 147; *Livingston v. Exum*, 19 S. C. 223; *Stell v. Pascal*, 41 Tex. 640; *Bingham v. City of Walla Walla*, 3 Wash. 68, 13 Pac. 408.)

"Anticipated profits dependent upon future contingencies cannot be included in damages." (*Bergen v. City of New Orleans*, 35 La. Ann. 523; *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. 151, 36 Pac. 368; *Crymble v. Mulvaney*, 21 Colo. 203, 40 Pac. 499; *O'Neill v. Johnson*, 53 Minn. 439, 39 Am. St. 615, 55 N. W. 601; *Anderson v. Taylor*, 56 Cal. 132, 38 Am. Rep. 52; *Casper v. Klippen*, 61 Minn. 353, 52 Am. St. 604, 63 N. W. 737.)

"Where a stock of goods is held under a wrongful attachment, loss of profits and business credit are too remote to be considered." (*Lowenstein v. Monroe*, 55 Iowa, 82, 7 N. W. 406.)

"It was error to permit plaintiff to show that prior to the attachment his business had been steadily increasing but decreased thereafter." (*Zinn v. Rice*, 161 Mass. 571, 37 N. E. 747.)

Argument for Respondents.

The plaintiffs had wholly failed to establish upon the part of defendant either malice or want of probable cause in the suing out of attachment—both indispensable to a recovery by plaintiffs. (*Stewart v. Sonneborn*, 98 U. S. 187, 25 L. ed. 116; *Vesper v. Crane Co.*, 165 Cal. 36, 130 Pac. 876, L. R. A. 1915A, 541; *Mitchell v. Silver Lake Lodge*, 29 Or. 294, 45 Pac. 789; *Hülfrich v. Meyer*, 11 Wash. 186, 39 Pac. 455.)

While malice may be presumed from a want of probable cause, yet such want may not be presumed, but must be clearly proven. (*Collins v. Shannon*, 67 Wis. 441, 30 N. W. 730; *Durr v. Jackson*, 59 Ala. 203.)

The officer acquired no lien. The officer levying must take actual possession of personal property. (3 Standard Ency. Procedure, 488, 511; *West Coast S. F. Co. v. Wulff*, 133 Cal. 315, 85 Am. St. 171, 65 Pac. 622; *Johnson v. Gorham*, 6 Cal. 195, 65 Am. Dec. 501.)

A levy on personal property capable of manual delivery must be had by taking the property into custody. (*Dutertre v. Driad*, 7 Cal. 549; *Herron v. Hughes*, 25 Cal. 555, 563; *Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256; *Throop v. Maiden*, 52 Kan. 258, 34 Pac. 801.)

“If the acts required by the statute are not performed by the officer, there is no levy of the writ.” (*First Bank v. Sonnelitner*, 6 Ida. 21, 51 Pac. 993.)

The lien is lost if the property is left with the defendant. (3 Standard Ency. Procedure, 512, 513, and citations; *Cupples v. Level*, 54 Wash. 299, 103 Pac. 430, 23 L. R. A., N. S., 519.)

S. T. Lowe, for Respondents.

“In an action to recover for the wrongful and malicious attachment of the plaintiffs’ goods where injury to their credit is alleged, evidence of the amount of their business and profits and credit and the effect upon the latter is admissible.” (*Hayes v. Union Mercantile Co.*, 27 Mont. 264, 70 Pac. 975.)

Loss of credit, business and profits caused by the wrongful, wanton and malicious issuance and levy of a writ of attach-

Argument for Respondents.

ment may be recovered as damages in an action to recover for such malicious attachment. (*Allison v. Chandler*, 11 Mich. 542; *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327; *Tranwick v. Martin-Brown Co.*, 79 Tex. 46, 14 S. W. 564; *Western News Co. v. Wilmarth*, 33 Kan. 510, 6 Pac. 786; *Donnell v. Jones*, 17 Ala. 689, 52 Am. Dec. 194; *Goldsmith v. Picard*, 27 Ala. 142; *Lawrence v. Hagerman*, 56 Ill. 68, 8 Am. Rep. 674; 1 Shinn, Attachment and Garnishment, par. 379; Waples on Attachment and Garnishment, par. 1010; 6 Corpus Juris, 540, paras. 1321-1323; *Schwartzberg v. Central Ave. State Bank*, 84 Kan. 581, 115 Pac. 110.)

It was not essential that the officers touch or remove the machine for the levy to be valid. (*Battlecreek Valley Bank v. Madison First Nat. Bank*, 62 Neb. 825, 88 N. W. 145, 56 L. R. A. 124; *Gaines v. Becker*, 7 Ill. App. 315; *Morse v. Smith*, 47 N. H. 474; *Nighbert v. Hornsby*, 100 Tenn. 82, 66 Am. St. 736, 42 S. W. 1060.)

"It is sufficient if the property is under the control of the officer, and he may even leave the debtor to hold as his agent" (*Corniff v. Cook*, 95 Ga. 61, 51 Am. St. 55, 22 S. E. 47; *Baldwin v. Jackson*, 12 Mass. 31; *Treadwell v. Brown*, 43 N. H. 290; *Train v. Willington*, 12 Mass. 495.)

Want of probable cause in itself raises a presumption of malice. (*Brand v. Hinchman*, 68 Mich. 590, 13 Am. St. 362, 36 N. W. 664; *Murphy v. Hubbs*, 7 Colo. 541, 49 Am. Rep. 366, 5 Pac. 119; *Southwestern R. R. Co. v. Mitchell*, 80 Ga. 438, 5 S. E. 490; *Holiday v. Sterling*, 62 Mo. 321; *McNamee v. Nesbitt*, 24 Nev. 400, 56 Pac. 37; *Durr v. Jackson*, 59 Ala. 203; *Collins v. Shannon*, 67 Wis. 441, 30 N. W. 730; *Parks v. Young*, 75 Tex. 278, 12 S. W. 986; *Toth v. Greisen* (N. J.), 51 Atl. 927; 2 Greenleaf on Evidence, sec. 453; *Martin v. Corscadden*, 34 Mont. 308, 86 Pac. 33.)

"If the attachment is dissolved, this is conclusive of the right of the attachment defendant to recover actual damages, although the attachment was taken out without malice and under legal advice." (*McDaniel v. Gardner*, 34 La. Ann. 340; *Kennedy v. Meacham*, 18 Fed. 312, 322.)

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MORGAN, J.—The respondents instituted this action against the appellant to recover damages for an attachment alleged to have been procured to be levied against their property wrongfully, maliciously and without probable cause. The attachment issued on July 28, 1911, and was dissolved on January 13, 1913. The suit in which the attachment was procured was decided in favor of respondents and against appellant. The property alleged to have been attached consisted of moneys, corporate stock, notes, real estate and a motorcycle. Respondents claim damages on account of being deprived of the use of the property and on account of loss of credit and profits in their business as building contractors. The case was tried to a jury, which returned a verdict in respondent's favor in the sum of \$1,000. Judgment was entered accordingly, from which this appeal was prosecuted.

Appellant contends that the evidence fails to show that the property was attached. This contention is sustained so far as it concerns the real estate and the motorcycle. The return of the sheriff was offered in evidence by respondents to show what property was attached, but such return is only *prima facie* evidence of the truth of the matters therein stated. (Sec. 2026, Rev. Codes.) According to the testimony of respondents, the sheriff went to their office and informed them that the motorcycle was attached, but left it with them upon promise that they would not use it. The sheriff testified that although he was about to attach the motorcycle, he decided, at the request of respondents and with the consent of the attorney for appellant, to not do so. Without discussing the conflict of evidence in this particular, we hold that, assuming respondents' testimony to be the truth in the matter, the sheriff did not levy upon the motorcycle in accordance with sec. 4307, Rev. Codes (amended, Sess. Laws 1911, chap. 162, p. 559), because he did not, at any time, take it into his custody or remove it from the custody of respondents. There is no levy under a writ of attachment unless the acts required by the statute are substantially performed. (*First Nat. Bank v. Sonnelitner*, 6 Ida. 21, 51 Pac. 993.) The uncontradicted testimony of the county recorder established the fact that no

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copy of the writ of attachment, or description of the real property alleged to have been attached, or notice of the attachment was ever filed in his office. Such filing is absolutely necessary under the provisions of sec. 4307, *supra*, in order to constitute a lawful levy upon real estate. No action lies for an attachment procured maliciously and without probable cause unless the levy is complete. (*Maskell v. Barker*, 99 Cal. 642, 34 Pac. 340.)

The question of whether or not the real property was attached, and whether or not the notice and description and a copy of the writ of attachment were filed in the office of the county recorder, was submitted to the jury, but as there was no evidence to dispute the testimony of the county recorder, that question should not have been submitted.

Appellant next contends that the evidence was insufficient to show any damage resulting from the alleged attachment. Respondents rely upon injury to their credit and loss of prospective profits in their business as contractors, which are elements of damage if the attachment was not merely wrongful, but malicious and without probable cause. (*Crymble v. Mulvaney*, 21 Colo. 203, 40 Pac. 499; note to *International Harvester Co. v. Iowa Hdw. Co.*, 29 L. R. A., N. S., 272; note to *Tisdale v. Major*, 68 Am. St. 263; note to *Ailstock v. Moore Lime Co.*, 7 Ann. Cas. 545; 6 Corpus Juris, pp. 539-541, and cases in notes 76, 78 and 80; Shinn on Attachments and Garnishments, p. 693.)

Assuming that the evidence in this case supports the allegations that the attachment was issued maliciously and without probable cause, loss of profits and credit could be considered by the jury in awarding damage, but only upon such evidence being submitted as would enable it to calculate, with reasonable certainty, the amount of damage resulting from such loss. In this connection respondents introduced testimony tending to show that during the year previous to the issuance of the attachment the volume of business obtained by them was large and the profits amounted to about \$3,000; that immediately after the attachment was dissolved their business and profits were about the same in volume, but that

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during the time the property was attached they performed very little business and received little or no profits, although, generally speaking, there was as much building in progress in the locality in which they operated during that time as there was prior to or after the time the attachment was in force. They testified that because their property was tied up by the attachment they could raise no money, and could not obtain credit sufficient to enable them to advance the cost of material necessary to be used in construction work. They made no attempt to show that any certain contract for building could have been obtained by them had they been in a condition to perform it. The jury was left to infer from the fact that their business was of certain magnitude before and after the attachment, the volume during the time of attachment would have been the same. In the business of contracting, which is neither steady nor uniform, the profits received, or the amount of building done at one time is not a safe criterion by which to judge what might have been done at another had not the property of the contractor been attached. In case of a building contractor there is no such thing as uniformity in the volume of business. During one year he may have contracts for the construction of a few large buildings and during the next for many more, but smaller structures. If, however, respondents had shown that had they been able, financially, to handle them, they would have received certain building contracts, which they lost by reason of the attachment, then it would have been competent for them to show, upon the theory that the attachment was malicious and without probable cause, the cost of the labor and materials they would have used and the amount of the contract price, and thus furnish to the jury a safe and reasonable basis for the calculation of lost profits. "Past profits cannot be shown to enable a jury to conjecture what future profits would be." (13 Cyc. 57; *Bierbach v. Goodyear Rubber Co.*, 54 Wis. 208, 41 Am. Rep. 19, 11 N. W. 514.) Where recovery by reason of loss of profits may be had, there must be such evidence as will enable the jury, with some degree of certainty, to ascertain the amount of the profits alleged to have been lost.

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(*Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, 49 C. C. A. 244; *Zinn v. Rice*, 161 Mass. 571, 37 N. E. 747.)

The final question to be decided is whether or not the evidence was sufficient to show malice and want of probable cause. As heretofore stated, although actual damage may be recovered where the attachment was merely wrongful, yet to sustain a judgment for damage for loss of credit and profits, the attachment must be malicious and without probable cause. It is not alone sufficient that malice existed, nor is it sufficient that there is want of probable cause, but both these elements must be present. However, malice may be inferred by the jury, from the lack of probable cause (*Ames v. Chirurg*, 152 Iowa, 278, 132 N. W. 427, 38 L. R. A., N. S., 120; note to *Tisdale v. Major*, *supra*), but the jury cannot infer want of probable cause from the mere fact that the action in which the attachment was issued was decided against the party procuring it. If the party suing out the writ of attachment had a reasonable belief in the existence of facts necessary to sustain the same, there was probable cause. (2 R. C. L. 899.) It is said that the test is what would prudent business men have done under like circumstances. (2 R. C. L., *supra*.) The burden is upon the party alleging malice and want of probable cause to prove the same. The evidence in this case shows that there was a dispute between the parties as to who was in debt to the other. Respondents had borrowed money from appellant and, on the other hand, were constructing a building for it. There was a dispute as to how much was due on the building. The books of appellant showed that respondents were in its debt to the extent of something over \$1,000. There is no evidence tending to show malice or want of probable cause or, as a matter of fact, anything further than an honest misunderstanding between the parties as to which one owed the other.

Judgment is reversed and the cause is remanded for a new trial. Costs are awarded to appellant.

Budge, C. J., and Rice, J., concur.

Petition for rehearing denied.

Argument for Appellant.

(May 4, 1917.)

SCHOOL DISTRICT No. 8, IN THE COUNTY OF TWIN FALLS, STATE OF IDAHO, Respondents, v. TWIN FALLS COUNTY MUTUAL FIRE INSURANCE COMPANY, a Corporation, Appellant.

[164 Pac. 1174.]

CONSTITUTIONAL LAW—SCHOOL DISTRICTS—INSURANCE CONTRACT—ESTOPPEL.

1. A school district cannot, under sec. 4 of art. 8 and sec. 4 of art. 12 of the constitution, become a member of a county mutual fire insurance company organized under the Laws of 1911, p. 768, as amended Laws of 1913, p. 129.

2. Sec. 4 of art. 8 and sec. 4 of art. 12 of the constitution are intended to prevent any county, city, town or other municipal corporation from becoming interested in any private enterprise or from using funds derived by taxation in any manner in aid of any private enterprise, with the exceptions provided for in sec. 4 of art. 12.

3. A school district is a municipal corporation within the meaning of sec. 4 of art. 12 of the constitution.

4. The liability of a member of a county mutual fire insurance company is unlimited, and therefore a contract by which a school district seeks to become a member of such organization is void under sec. 3 of art. 8 of the constitution. *Held*, that a contract of insurance between a school district and a county mutual fire insurance company is void, and will form no basis for recovery as against the insurance company for loss by fire.

5. A county mutual fire insurance company cannot accept a member whose liability may be limited.

6. An estoppel can never be invoked in aid of a contract which is expressly prohibited by a constitutional or statutory provision.

APPEAL from the District Court of the Fourth Judicial District, for Twin Falls County. Hon. E. A. Walters, Judge.

Action upon a contract of insurance. Judgment for plaintiff. *Reversed*.

Guthrie & Bowen, for Appellant.

The board not having the power to make such a contract could not create a liability against the district, and they could

Argument for Appellant.

be prevented from paying an assessment, particularly if beyond the statutory limitation. (*Nuckols v. Lyle*, 8 Ida. 589, 70 Pac. 401; *Hampton v. Commrs. of Logan County*, 4 Ida. 646, 43 Pac. 324; *McNutt v. Lincoln Co.*, 12 Ida. 63, 84 Pac. 1054.)

In creating legal liabilities, the board of a school district as well as the commissioners of the county must act under the law. (*Ward v. Holmes*, 26 Ida. 602, 144 Pac. 1104; *Peavy v. McCoombs*, 26 Ida. 143, 140 Pac. 965.)

Where by statute or constitution the power of a municipality or quasi municipality to make a contract is limited, any attempted contract beyond such limitation is void, and no recovery on an implied contract ever can be had for benefits received. No estoppel precludes the municipality from denying liability. (*Richardson v. Grant County*, 27 Fed. 495; *Fountain v. Sacramento*, 1 Cal. App. 461, 82 Pac. 637; note to 27 L. R. A., N. S., 1120, and cases cited; 20 Am. & Eng. Enc. of Law, 1182; *Thornburg v. School Dist.*, 175 Mo. 12, 75 S. W. 81; *Citizens' Bank v. Spencer*, 126 Iowa, 101, 101 N. W. 643; *Herman v. Oconto*, 110 Wis. 660, 86 N. W. 681; *Balch v. Beach*, 119 Wis. 77, 95 N. W. 132; *Gutta-Percha & Rubber Mfg. Co. v. Village of Ogalalla*, 40 Neb. 775, 42 Am. St. 696, 59 N. W. 513; *State ex rel. Helena Water-Works Co. v. Helena*, 24 Mont. 521, 81 Am. St. 453, 63 Pac. 99, 55 L. R. A. 336; *Hart v. Village of Wyndmere*, 21 N. D. 383, Ann. Cas. 1913D, 169, 131 N. W. 271.)

The rule that neither party can take advantage of the invalidity of a contract while retaining the benefits applies only to voidable contracts and not those which are void, as applied to municipalities or quasi municipalities. (*Independent School Dist. v. Collins*, 15 Ida. 535, 128 Am. St. 76; 9 Cyc. 325; *Stiles v. McClellan*, 6 Colo. 89; *Semon Bache & Co. v. Coppes etc. Co.*, 35 Ind. App. 351, 111 Am. St. 171, 74 N. E. 41; *Doe v. Culverwell*, 35 Cal. 291; *Fanning v. Hibernia Ins. Co.*, 37 Ohio St. 339, 41 Am. Rep. 517.)

A mutual company cannot insure beyond the limits of its charter. It cannot insure the property of persons not entitled to become members, nor in territory not permitted, nor

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on property not allowed. Attempts to insure create no liability. (*Andrews v. Union Mut. Fire Ins. Co.*, 37 Me. 256; *Kansas Home Ins. Co. v. Wilder*, 43 Kan. 731, 23 Pac. 1061; *Eddy v. Merchants' Mfrs. & Citizens' Mut. Fire Ins. Co.*, 72 Mich. 651, 40 N. W. 775; *Delaware Farmers' Mut. Fire Ins. Co. v. Wagner*, 56 Minn. 240, 57 N. W. 656; *O'Neil v. Pleasant Prairie M. Fire Ins. Co.*, 71 Wis. 621, 38 N. W. 345; 28 Cent. Digest, Title Insurance, sec. 73.)

C. O. Longley and Taylor Cummins, for Respondent.

The provisions of the constitution, which prohibits cities, etc., from loaning their credit to any corporation and from becoming directly or indirectly the owners of any stock of any corporation, would not be violated by upholding this contract of insurance. (*French v. City of Millville*, 66 N. J. L. 392, 49 Atl. 465; *St. Paul Trust Co. v. Wampach Mfg. Co.*, 50 Minn. 93, 52 N. W. 274.)

The defendant should be estopped from saying either that the school district as such cannot become a member of and insured in a company constituted as the defendant company, or that the school district was not, as a matter of fact, a member of and insured by the defendant company at the time the loss in question occurred. (16 Cyc. 722, 725, 749; *People's Fire Ins. Assn. v. Goyne*, 79 Ark. 315, 9 Ann. Cas. 373, 96 S. W. 365, 16 L. R. A., N. S., 1180, and note.)

RICE, J.—This action was instituted by the respondent in the district court for Twin Falls county to recover upon an alleged contract of insurance. From a judgment in favor of respondent this appeal was taken. In the complaint it is alleged that the plaintiff below, respondent here, is a school district organized under the laws of this state; that the defendant, appellant here, is a mutual fire insurance company organized under the laws of this state and doing business in Twin Falls county. It is further alleged that the respondent applied to appellant for insurance on its school building, and that the appellant agreed to insure the same; that the building so sought to be insured was burned, and that appellant

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failed to pay the insurance as agreed. To the complaint demurrer was filed, upon the ground, among others, that the complaint did not state facts sufficient to constitute a cause of action.

Under the constitution of the state, school districts are prohibited from becoming members of a county mutual fire insurance company. Sec. 4 of art. 8 of the constitution is as follows: "No county, city, town, township, board of education, or school district, or other subdivision, shall lend or pledge the credit or faith thereof directly or indirectly, in any manner, to, or in aid of any individual, association or incorporation, for any amount or for any purpose whatever, or become responsible for any debt, contract or liability of any individual, association or corporation in or out of this state." Sec. 4 of art. 12 of the constitution contains the following provision: "No county, town, city or other municipal corporation, by vote of its citizens or otherwise, shall ever become a stockholder in any joint stock company, corporation or association whatever, or raise money for, or make donation or loan its credit to, or in aid of, any such company or association."

In the case of *Atkinson v. Board of Commissioners*, 18 Ida. 282, 108 Pac. 1046, 28 L. R. A., N. S., 412, this court, speaking of sections 2 and 4 of art. 8 of the constitution, said:

"Section 2 prohibits the state in any manner ever becoming interested with any individual, association or corporation in any business enterprise, and it likewise prohibits the state in any manner loaning its credit to the aid of such an enterprise or becoming a stockholder therein; while sec. 4 makes substantially the same prohibition against any county, city, town, township, board of education, school district, or other subdivision of the county or state, ever lending its credit, either directly or indirectly, to any business enterprise in aid of any individual, association or corporation. Sec. 4 of art. 12 reiterates substantially the same thing with reference to counties and municipal corporations as is provided against in sec. 4 of art. 8. Sec. 4 of art. 12, however, specifically authorizes cities and towns to contract indebtedness for

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'school, water, sanitary and illuminating purposes,' thereby excluding all other purposes not governmental in their character."

The sections of the constitution referred to are self-operative. They are intended to prevent any county, city, town or other municipal corporation from lending credit to or becoming interested in any private enterprise, or from using funds derived by taxation in aid of any private enterprise, with the exceptions provided for in sec. 4 of art. 12. It is true that sec. 4 of art. 12 does not specifically mention school districts, but when the other provisions of the constitution are taken into consideration, as well as the objects sought to be attained, it must be held that school districts are municipal corporations within the meaning of said sec. 4. (*Mazon v. School Dist.*, 5 Wash. 142, 31 Pac. 462, 32 Pac. 110; *State v. Grimes*, 7 Wash. 191, 34 Pac. 833; *Pioneer Irr. Dist. v. Walker*, 20 Ida. 605, at p. 615, 119 Pac. 304.)

In *Fenton v. Board of County Commrs.*, 20 Ida. 392, 119 Pac. 41, this court held that school districts are not municipal corporations within the meaning of sec. 6 of art. 7 of the constitution, and in that opinion the court said that it did not think art. 12 thereof included them. The holding in that case should be confined to the section of the constitution under consideration therein. It would be contrary to the intent and purpose of the constitution to hold that a school district is not included within the term "other municipal corporation," contained in sec. 4 of art. 12 thereof.

To permit a school district to become a member of a county mutual fire insurance company would be to indirectly sanction the use of public funds raised by taxation for a private as distinguished from a public purpose. The appellant company was organized under the 1911 Sess. Laws, p. 767, as amended 1913 Sess. Laws, p. 129. The purpose for which a county mutual fire insurance company may be organized is expressed in the opening sentence of said law, which reads as follows: "Twenty-five or more persons, citizens of Idaho and owning insurable property in any county in this state, may form a county mutual fire insurance company in such

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county *for the purpose of insuring each other* against loss by fire, lightning, tornado, windstorm or hailstorm on property situated in the county in which the headquarters of the association are located." The statute further provides, with reference to articles of incorporation of such companies, as follows: "They shall also state the objects of the organization as being one or more of the objects set forth in this section, and to enforce any contract which may be by them entered into, by which those entering therein shall agree to be assessed specifically for incidental purposes and for the payment of losses which occur to its members." It is further provided: "Such company shall in no instance have power to insure the property of others than members of the company, and all the policies issued by the company must state specifically that the liability of each member is not limited." It is evident, therefore, that a person cannot become a member of appellant company, or any such company, without becoming an insurer of the property of other members, and his liability for the benefit of the other members will be unlimited, or limited only by the amount of insurance in force and the solvency of the members of the company.

By the terms of sec. 3 of art. 8 of the constitution, a school district is prohibited from incurring any indebtedness or any liability in any manner or for any purpose exceeding in any year the income or revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose. The language of this section is very broad and prohibits the incurring of any indebtedness or any liability in any manner or for any purpose contrary to its provisions. It may be that a postponed contingent liability is not an indebtedness within the meaning of the section of the constitution until the contingency has occurred, but it is a liability which may become an indebtedness upon the happening of the contingency. Liabilities which are assumed by virtue of membership in a county mutual fire insurance company are not within the control of the member or limited in amount, and the contingency may occur at any time. The assumption of such liability by

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a school district is contrary to the provisions of sec. 3 of art. 8 of the constitution.

It may be that the purpose of the respondent in attempting to become a member was simply to purchase insurance, and that the actual assessments which it would be called upon to pay probably would be less in amount than the fixed premiums required by regular insurance companies, but such considerations cannot prevail. The case of *French v. Mayor of City of Millville*, 66 N. J. L. 392, 49 Atl. 465, is not in point. The law incorporating the mutual insurance company involved in that case is not at hand, but it appears from the opinion of the court that though the city became a "member" of a mutual insurance company, the company was entirely different from the appellant herein, for the reason that the maximum liability of the member was always fixed, and therefore the city did not assume an unlimited liability and did not become an insurer of the other members of the corporation.

Not only is a school district prohibited from becoming a member of such insurance company, but the company itself by necessary implication is prohibited from accepting as a member any person whose liability may be limited.

It follows that there could have been no contract of insurance existing between the respondent and appellant, and this action cannot be maintained. (*Corbitt v. Salem Gas Light Co.*, 6 Or. 405, 25 Am. Rep. 541.) Respondent contends, however, that the appellant was estopped to deny the existence of the contract of insurance by reason of the fact that owing to the representations of the agents of appellant, the respondent was induced to cancel a portion of an insurance policy which had been issued upon its property. While it is doubtful whether sufficient facts to constitute an estoppel were alleged or proved in this case, yet that consideration is not important. Estoppel cannot be invoked to prevent the denial of power in a municipal corporation to enter into a contract which is expressly prohibited by a constitutional provision or a statute. (*City Council of Montgomery v. Montgomery etc. Plank Road Co.*, 31 Ala. 76; *Dillon on*

Argument for Appellant.

Municipal Corporations, 5th ed., p. 1183; *Portland v. Bituminous Paving Co.*, 33 Or. 307, 72 Am. St. 713, 52 Pac. 28, 44 L. R. A. 527; *Montgomery v. Whitbeck*, 12 N. D. 385, 96 N. W. 327; *In re Mutual Guaranty Fire Ins. Co.*, 170 Iowa, 143, 70 Am. St. 149, 77 N. W. 868; and compare *McNutt v. Lemhi County*, 12 Ida. 63, 84 Pac. 1054.)

The judgment is reversed. Costs awarded to appellant.

Budge, C. J., and Morgan, J., concur.

(May 5, 1917.)

UTAH IMPLEMENT-VEHICLE COMPANY, Appellant,
v. W. D. KENYON, Respondent.

[164 Pac. 1176.]

PROMISSORY NOTE—ASSIGNMENT—REAL PARTY IN INTEREST.

1. One who holds a note by assignment for the purpose of collection is the real party in interest in his own name.

2. An indorsee, who is in possession of a promissory note, is the "holder" thereof, and may sue thereon in his own name.

[As to who is a *bona fide* holder of note, see notes in 9 Am. Dec. 272; 44 Am. Dec. 698.]

APPEAL from the District Court of the Fourth Judicial District, for Cassia County. Hon. Chas. O. Stockslager, Judge.

Action on promissory note. Judgment for defendant. *Reversed.*

Charles A. Sunderlin, for Appellant.

"Where an assignment of anything in action is absolute in its terms, so that the entire apparent legal title vests in the assignee, the assignee may sue in his own name without joining the assignor as a party, although there was no considera-

Opinion of the Court—Budge, C. J.

tion for the assignment and notwithstanding whatever collateral arrangements between him and the assignor as to the disposition to be made of the proceeds." (4 Cyc. 100, and cases cited; *Brumback v. Oldham*, 1 Ida. 709; *Arthur v. Brooks*, 14 Barb. (N. Y.) 533; *Wetmore v. City of San Francisco*, 44 Cal. 294; *Toby v. Oregon Pac. R. Co.*, 98 Cal. 490, 497, 33 Pac. 550; *Widaman v. Hubbard*, 88 Fed. 806, 812; *East Texas Fire Ins. Co. v. Coffee*, 61 Tex. 287, 291; *Stevens v. Brown*, 20 W. Va. 450, 459.)

Even though the chose, capable of legal assignment, is on its face absolutely assigned, yet the assignment is made for the purpose of collection only, the legal title vests in the assignee, and he is the real party in interest for the purpose of instituting suit. (4 Cyc. 67; *Greig v. Riordan*, 99 Cal. 316, 33 Pac. 913; *Goodnow v. Litchfield*, 63 Iowa, 275, 19 N. W. 226; *Tuller v. Arnold*, 98 Cal. 522, 33 Pac. 445; *Bassett v. Inman*, 7 Colo. 270, 3 Pac. 383; *Gomer v. Stockdale*, 5 Colo. App. 489, 39 Pac. 355; *Walburn v. Chenault*, 43 Kan. 352, 23 Pac. 657; *Struckmeyer v. Lamb*, 64 Minn. 57, 65 N. W. 930; *Guerney v. Moore*, 131 Mo. 650, 32 S. W. 1132; *Meeker v. Claghorn*, 44 N. Y. 349.)

T. Bailey Lee, for Respondent, files no brief.

BUDGE, C. J.—This action was brought by appellant on a promissory note, executed by respondent and made payable to the order of the Snake River Implement Company, Limited. The note was in the principal sum of \$2,300, was dated November 20, 1911, due on or before two years after date, and bore interest at the rate of five per cent per annum from January 1, 1912. It is alleged in the complaint:

"That on or about the 18th day of January, 1914, for a valuable consideration, this promissory note was duly and legally assigned by indorsement and delivery, by the said Snake River Implement Company, Limited, to the plaintiff in this action.

"Plaintiff is now the lawful owner and holder of this note."

The answer denied that the note "was for any consideration duly or legally or at all assigned or indorsed by said Snake River Implement Company to said plaintiff." And it is affirmatively alleged in the answer "that said note was assigned without authority to said plaintiff by someone in the office of the said Snake River Implement Company; that said Snake River Implement Company has never received any consideration for said note, but that this defendant is charged with said note at this time on the books of said company, and that payment of said note is now being demanded of this defendant by said alleged assigning company.

"Denies that plaintiff is the lawful owner or holder of said note, but alleges that the true owner is the said Snake River Implement Company."

The answer further admitted that appellant made demand upon respondent for the payment of the note. The cause was tried by a court and a jury; the jury returned a special verdict, finding:

1. That the Snake River Implement Company had received consideration from appellant for the note.

2. That at the time of the institution of the suit appellant held the direct note of the Snake River Implement Company for the indebtedness owed appellant by the said company.

3. That the Snake River Implement Company, by its duly authorized agent, legally and lawfully assigned the note for a valuable consideration to appellant, without any limitations as to ownership.

4. That appellant was the legal owner and holder of the note.

5. That the note was assigned to appellant as security for indebtedness owed appellant by the Snake River Implement Company.

Upon these findings the court entered a judgment for the respondent. This appeal is from the judgment and from an order, filed the same day as the judgment, dissolving the attachment which had been theretofore issued and levied against the property of the respondent. That portion of the appeal which appeals from the order dissolving the attach-

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ment will not be considered, for the reason that no bond was filed sufficient to continue in force the attachment, as provided in sec. 4814, Rev. Codes.

Appellant assigns the following errors: First, that the judgment will not support the findings of the jury; second, the evidence is wholly insufficient to support the judgment; third, the judgment is erroneous in that the court found in favor of respondent and against appellant; fourth the judgment is not supported by the law of the case.

The only questions involved are: First, was there a valid assignment of the note? Second, is appellant the real party in interest? All of the evidence shows that respondent executed the note and delivered it to the Snake River Implement Company; that the Snake River Implement Company authorized the assignment thereof to appellant; that the said note was duly assigned and indorsed by C. E. Peterson, the general manager of the Snake River Implement Company, and delivered to appellant; that appellant was authorized to collect the note; and that whatever sum should be collected upon the note should be credited by appellant upon the indebtedness of the Snake River Implement Company. The evidence is conclusive and uncontradicted upon all of these points. The law is well settled in this state that under such circumstances the holder of the note is authorized to sue upon it; the controlling case upon the question is *Craig v. Palo Alto Stock Farm*, 16 Ida. 701, 102 Pac. 393. The law is there clearly announced to the effect that where one holds a note by assignment, for the purpose of collection, he is the real party in interest, and is authorized to sue thereon in his own name, and that the holder of a negotiable instrument is the payee or indorsee who is in possession of it, or the bearer thereof. The Craig case has been followed in *Home Land Co. v. Osborn*, 19 Ida. 95, 112 Pac. 764; *Anderson v. Coolin*, 28 Ida. 494, 155 Pac. 677; see, also, *Brumback v. Oldham*, 1 Ida. 709; *Pomeroy's Code Remedies*, 4th ed., sec. 70.

It is impossible to determine upon what theory of law the trial court proceeded in rendering judgment for respondent under the facts as found by the jury or as disclosed by the

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evidence; indeed, under the evidence in this case, the appellant was entitled to a directed verdict, and there was no real occasion for submitting even the finding of facts to the jury.

The judgment is therefore reversed and the trial court is instructed to enter judgment for the appellant, in accordance with the prayer of his complaint and the principles herein announced. Costs awarded to appellant.

(May 5, 1917.)

STATE, Respondent, v. DAN CUMMINS, Appellant.

[165 Pac. 216.]

CONSTITUTIONAL LAW—INTOXICATING LIQUORS—TRANSPORTATION OF—
MISDEMEANOR.

1. Section 25, S. B. No. 62, Sess. Laws 1909, p. 17, makes the transportation of intoxicating liquors into a prohibition district, or into any point or place in this state where the sale of intoxicating liquors is prohibited by law, a misdemeanor.

2. This section does not contravene the provisions of the 5th or 14th amendments to the constitution of the United States nor the provisions of section 1, art. 1, of the constitution of the state of Idaho.

3. An act prohibiting the transportation of intoxicating liquors into territory where the sale thereof is prohibited by law is a valid exercise of the police power.

[As to validity of statute forbidding the bringing of liquor into prohibition territory, see note in *Ann. Cas.* 1917A, 740.]

APPEAL from the District Court of the Fourth Judicial District, for Minidoka County. Hon. Edward A. Walters, Judge.

Prosecution for the crime of transporting intoxicating liquors into a prohibition district. Judgment of conviction, from which defendant appeals. *Affirmed.*

On constitutionality of statute forbidding carrying of liquor into prohibition district, see note in *L. E. A., N. S.*, 299.

Argument for Respondent.

T. Bailey Lee, for Appellant.

"Spirituuous liquors are property, and do not cease to be so when their sale is prohibited." (*Preston v. Drew*, 33 Me. 558, 54 Am. Dec. 639; *Lincoln v. Smith*, 27 Vt. 328.)

Under the constitutions, a state legislature is impotent in the exercise of its police power to interfere with this possession and enjoyment, unless the manner in which the owner exercises the same be injurious to others. (*Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. ed. 205; *State v. Williams*, 146 N. C. 618, 14 Ann. Cas. 562, 61 S. E. 61, 17 L. R. A. N. S., 299.)

"The power does not exist to control rights that are purely and exclusively private." (*Munn v. Illinois*, 94 U. S. 113, 124, 24 L. ed. 77, 83.)

J. H. Peterson, Atty. Gen., T. C. Coffin and Herbert Wing, Assts., Homer C. Mills, Pros. Atty., Minidoka County, and E. G. Davis, for Respondent.

Similar laws have been upheld upon the ground that transportation of liquor into prohibition territory is deemed to be unlawful, and it is not incumbent upon the state in a prosecution under such acts, as a part of its case in chief, to negative the lawfulness of the shipment, but it is rather a matter of defense for the defendant to show that the shipment, and his possession thereof, was a lawful one. (*Jones on Evidence*, sec. 181, *Rupard v. State*, 7 Okl. Cr. 201, 122 Pac. 1108; *State v. Pope*, 79 S. C. 87, 60 S. E. 234; *Southern Express Co. v. City of High Point*, 167 N. C. 103, 83 S. E. 254; *State v. Southern Express Co.*, 168 N. C. 207, 83 S. E. 751; *Maynes v. State*, 6 Okl. Cr. 487, 119 Pac. 614; *Longmire v. State*, 75 Tex. Cr. 616, Ann. Cas. 1917A, 726, 171 S. W. 1165; *Southern Express Co. v. State*, 188 Ala. 454, 66 So. 115; *Adams Express Co. v. Commonwealth*, 154 Ky. 462, 157 S. W. 908, 48 L. R. A., N. S., 342.)

Section 25 has been construed by this court in the case of *Crescent Brewing Co. v. Oregon Short Line R. Co.*, 24 Ida. 106, 132 Pac. 975.

Opinion of the Court—Budge, C. J.

BUDGE, C. J.—Appellant was convicted of the crime of unlawfully transporting liquors into a prohibition district. A motion for a new trial was overruled. This appeal is from the judgment and from the order overruling appellant's motion for a new trial. The information was brought under section 25, S. B. No. 62, Sess. Laws, 1909, p. 17, which reads as follows:

"Sec. 25. Any person, firm, corporation, society or club within this State who shall accept for shipment, transportation or delivery, or who shall ship, transport or deliver any intoxicating liquors to any person, firm, corporation, society or club in any prohibition district in the State of Idaho, or to any point or place in this State where the sale of intoxicating liquors is prohibited by law, except as may be authorized by this Act or the Inter-State Commerce Law of the United States, shall be guilty of a misdemeanor and punished as provided in Section 30 of this Act."

The charging part of the information reads as follows:

"That the said D. H. Cummins, on or about the 17th day of April, A. D., 1914, at Paul, in the County of Minidoka, State of Idaho did wilfully, knowingly and unlawfully ship, transport and deliver intoxicating liquors from Jerome, Idaho, into a prohibition district of the State of Idaho, to-wit: Paul, Minidoka County, Idaho, well knowing that he, the said D. H. Cummins was transporting intoxicating liquors, to-wit: whiskey into a prohibition district of the State of Idaho, to-wit: Paul, Minidoka County, Idaho. That said transportation of intoxicating liquors was not authorized by the law of the State of Idaho, or the interstate commerce law of the United States, or for any other lawful purpose, and contrary to Senate Bill No. 62 of the Session Laws of the State of Idaho for the year 1909."

Appellant assigns the following errors:

"1. The court erred in overruling defendant's demurrer to the information.

"2. The court erred in overruling defendant's objection to the introduction of any evidence touching his transportation of intoxicating liquors into Minidoka county.

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“3. The court erred in overruling defendant’s motion that he be discharged, and the cause dismissed.

“4. The court erred in overruling defendant’s motion for a new trial.”

And further assigns that: “The evidence is insufficient to support the verdict, there being in the record no evidence whatever to sustain it.”

The main contention of appellant is, that the transportation of intoxicating liquors through a prohibition district does not come within the purview of the statute above quoted, for the reason, as appellant urges, that to so hold would make the statute unconstitutional, in that it would then contravene the provisions of the 5th and 14th amendments to the constitution of the United States and section 1, art. 1 of the constitution of the State of Idaho, for the reason “that it unequivocally prohibits the use and enjoyment by one of his own property, and in effect deprives him thereof without due process of law.”

Since the briefs in this case were filed this court decided the case of *In re Crane*, 27 Ida. 671, 151 Pac. 1006. The objections to the constitutionality of such legislation are thoroughly reviewed in that opinion, and the conclusion there reached is adverse to the contention of appellant in this case. It is unnecessary to here review all the authorities considered in the *Crane* case. It will be noticed, however, that the opinion in that case quotes with approval the following language from *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. ed. 205:

“And so, if, in the judgment of the legislature, the possession of intoxicating liquors would tend to cripple, if it did not defeat, the efforts to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question.”

We hold, therefore, that under the section of the statute above quoted the transportation of intoxicating liquors to any point or place in this State, where the sale of intoxicating

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liquors is prohibited by law, is a misdemeanor. This is a valid exercise of the police power. (*Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311, Ann. Cas. 1917B, 845, 37 Sup. Ct. 180, 61 L. ed. 326; *In re Crane*, *supra*; *Glenn v. Southern Express Co.*, 170 N. C. 286, 87 S. E. 136, distinguishing and modifying *State v. Williams*, 146 N. C. 618, 14 Ann. Cas. 562, 61 S. E. 61, 17 L. R. A., N. S., 299.)

The information is sufficient to charge the crime of transporting intoxicating liquors into a prohibition district under the provisions of this section of the statute. The evidence shows conclusively that appellant procured the whisky at Jerome, Idaho, and that he transported it upon the train into Paul, Minidoka county, Idaho, which was then within a prohibition district, within which the sale of intoxicating liquors was prohibited by law.

There is no force in appellant's contention that he had not delivered any of the whisky to any person; that he was retaining it in his own possession; and that he was merely transporting it through the prohibition district to his own home. It is not necessary under the provisions of the statute, to either plead or prove that the liquor was delivered to any person.

The evidence is sufficient to sustain the verdict and judgment. The judgment is therefore *affirmed*.

(May 5, 1917.)

STATE, Respondent, v. A. G. BUTTERFIELD, Appellant.

[165 Pac. 218.]

PUBLIC RANGE—CATTLE—SHEEP—CUSTOM AND USAGE.

1. Under sec. 6872, Rev. Codes, if the usual and customary use of a range has been for cattle, it is a cattle range.
2. If the usual and customary use of a range has been for both cattle and sheep, it is not a cattle range under said section, but a cattle and sheep range.
3. The exclusive right of cattlemen as against sheepmen to the use of certain range which has first been occupied by the cattlemen

Argument for Appellant.

may be abandoned by their act in entirely ceasing to use said range, or by permitting the customary use of it for sheep in common with cattle, without protest, or asserting an exclusive right.

4. If cattlemen and sheepmen jointly use the range in the usual and customary manner of using it for a period of time long enough to create a custom, if the cattlemen know of such joint use and do not protest against it nor claim a prior and exclusive right to the same, then the herding or grazing of sheep upon such range is not unlawful, even though it be a fact that before such customary joint use for both sheep and cattle, the land was used exclusively for cattle.

5. The evidence in this case held insufficient to justify a verdict of guilty of grazing sheep upon a cattle range.

6. Proof of customary use of a range for both cattle and sheep in common is proper evidence to consider in determining whether such range has been abandoned as a cattle range, and an instruction to this effect, requested by defendant, should have been given by the trial court.

7. *Held*, that said sec. 6872, Rev. Codes, is not unconstitutional and void. *State v. Horn*, 27 Ida. 782, 152 Pac. 275, and *State v. Omacchevviaria*, 27 Ida. 797, 152 Pac. 280, approved and upheld.

[As to implied contract to pay rent for use of another's land for grazing cattle, see note in *Ann. Cas.* 1912C, 1147.]

APPEAL from the District Court of the Seventh Judicial District, for Washington County. Hon. Ed. L. Bryan, Judge.

Defendant was convicted of having violated sec. 6872, Rev. Codes, by herding, grazing and pasturing sheep upon a cattle range. *Reversed*.

Alfred A. Fraser and E. R. Coulter, for Appellant.

The statute is so ambiguous and uncertain as to render it void. (*Louisville & N. R. Co. v. Railroad Commission*, 19 Fed. 679; *Jannin v. State*, 42 Tex. Cr. 631, 96 Am. St. 821, 51 S. W. 1126, 62 S. W. 419, 53 L. R. A. 349; *Louisville & Nashville R. R. Co. v. Commonwealth*, 99 Ky. 132, 59 Am. St. 457, 35 S. W. 129, 33 L. R. A. 209; *Chicago & N. W. Ry. v. Dey*, 35 Fed. 866, 1 L. R. A. 744; *Ex parte Jackson*, 45 Ark. 158.)

The police power of the state has its limitations, and in order to be valid, the law must be founded upon some reason

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recognized as coming within the police power. (*Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. ed. 385.)

Again, this statute is void for uncertainty, in that it fails to define a cattle range or fix the boundaries thereof. (*Holcomb v. Keliher*, 5 S. D. 438, 59 N. W. 227.)

If the court should attempt to give a definition upon this question, and therefore aid out this indefinite statute, it would be judicial legislation, and the crime would then be defined by the court and not by the statute. (*Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. ed. 220.)

Sec. 6872, Rev. Codes of Idaho, is in direct conflict with the act of Congress of Feb. 25, 1885, and therefore null and void. (*McGinnis v. Friedman*, 2 Ida. 393, 17 Pac. 635; *United States v. Douglas-Willan Sartoris Co.*, 3 Wyo. 287, 22 Pac. 92.)

T. A. Walters, Atty. Gen., and Lot L. Feltham, for Respondent.

The statute has been held constitutional, and has been enforced. (*State v. Horn*, 27 Ida. 782, 152 Pac. 275; *State v. Omaechevriaria*, 27 Ida. 797, 152 Pac. 280.)

McCARTHY, District Judge.—This case was commenced in the probate court of Washington county, upon a complaint charging the defendant with a violation of the provisions of sec. 6872, Rev. Codes. Upon the trial in said court the defendant was found guilty as charged in the complaint and an appeal was taken from the judgment to the district court for Washington county. Upon the trial in the district court the defendant was again found guilty and the court sentenced him to pay a fine of \$25 and the costs of the action. The appeal herein is from said judgment of the district court.

The principal assignments of error relied upon by appellant, are:

First, that the court erred in refusing to give certain instructions which were requested by him;

Second, that the evidence is insufficient to justify the verdict; and,

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Third, that the statute upon which the prosecution is based is unconstitutional and void.

The complaint alleges that the defendant herded, grazed and pastured, and permitted and suffered a band of sheep to be herded, grazed and pastured on the range in question, said range being then and there cattle range previously occupied by cattle, and range then and there usually occupied by cattle-growers, the said defendant having full knowledge of the character of said range.

It is stipulated by and between the parties that the tract of land or range mentioned in the complaint has ever since the year 1885 been used both as a cattle and sheep range in the usual and customary use of such range as a cattle or sheep range. The defendant was convicted of permitting and suffering sheep to be herded, grazed and pastured upon said range. The case was prosecuted under the provisions of sec. 6872, Rev. Codes, which reads as follows:

“Any person owning or having charge of sheep, who herds, grazes, or pastures the same, or permits or suffers the same to be herded, grazed or pastured on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle, is guilty of a misdemeanor; but the priority of possessory right between cattle and sheep owners to any range, is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range.”

There is evidence in the record to the effect that the range was first used for horses and cattle in 1874, and has been used continuously for horses and cattle ever since. The evidence shows that sheep came upon the range about 1885. There is evidence that since 1890 the defendant himself has ranged sheep upon the range in question. The stipulation is to the effect that ever since 1885 sheep have ranged upon it in the usual and customary use of it as a sheep range. No protest on the part of the cattlemen and no claim of exclusive right on their part is shown in the evidence up to within a few days prior to the commencement of this action.

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The defendant requested several instructions on the question of abandonment, among others the following:

"The jury are instructed that if you find from the evidence that continuously since the year 1885 the range or tract of land mentioned in the complaint has been jointly used both as a cattle and sheep range in the usual and customary use of such range, then you should take this fact into consideration upon the question as to whether or not such range had been abandoned as an exclusive cattle range."

This and all other instructions on that question requested by the defendant were refused by the trial court. The trial court instructed the jury upon the question of abandonment, saying that the state must show that the range had not been abandoned as a cattle range, and that if the evidence proved that it had been abandoned as a cattle range, the verdict must be for the defendant. The trial court did not define in its instructions what is meant by the word "abandonment" as used in this action. In the case of *State v. Omaechevviaria*, 27 Ida. 797, 152 Pac. 280, this court apparently recognizes the defense of abandonment in this class of cases, saying in substance that the state must show that the range had not been abandoned as a cattle range. The defense of abandonment was not made in that case, and therefore the court did not enter into a detailed discussion of that subject. The trial court in this case followed substantially the language used by the supreme court in *State v. Omaechevviaria*, *supra*. However, in the present case the defense of abandonment was specifically raised by the defendant and the evidence produced makes it necessary to treat specifically of that question.

The statute says that "priority of possessory right . . . is determined by the priority in the usual and customary use of the range." If the usual and customary use of the range has been for cattle, then it is cattle range. If the usual and customary use of the range has been for sheep, then it is not a cattle range. If the usual and customary use of such land has been by both cattle and sheep, then it is not a cattle range, but a cattle and sheep range. It is the contention of the state in this case that if the range is first used for cattle, then the

Opinion of the Court—McCarthy, District Judge.

joint use of the range by cattle and sheep for a period of time, however long, will not divest it of its character as a cattle range. The state contends that the defense of abandonment does not apply unless the cattlemen absolutely and entirely cease to use the range for cattle. The first part of sec. 6872 may seem to give some color to this contention. The last part of it, however, seems to be against this contention. If the priority of possessory right depends upon the usual and customary use of the range, and the range has been used for a time long enough to create a custom by both cattlemen and sheepmen, without any protest on the part of the cattlemen, then it would seem that the usual and customary use of that range is a joint use by both sheep and cattle. The right which is given the cattlemen by this statute is an exclusive right as against sheepmen to certain range which they first use for cattle. The term "cattle range," as used in this statute, means an exclusive cattle range. If the exclusive right can be abandoned by the act of the cattlemen in entirely ceasing to use the range, it seems to us that it can also be abandoned by them by permitting the customary grazing of sheep upon the land in common with the cattle without protest. Evidence tending to show that they had permitted the sheepmen to use said range jointly with them since 1885, without protest, is therefore evidence tending to show that said range had been abandoned as a cattle range. If cattlemen and sheepmen jointly use the range in the usual and customary manner of using it for a period of time long enough to create a custom, if the cattlemen know of such joint use and do not protest against such use of the range for sheep, nor claim a prior and exclusive right to the same, then the herding or grazing of sheep upon such range is not unlawful, even though it be a fact that before such customary joint use for both sheep and cattle, the land was used exclusively for cattle. We therefore think that the court should have given to the jury the instruction requested by the defendant and quoted above, to the effect that they might take proof of the joint use of the range into consideration in determining

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whether or not the cattlemen had abandoned their claim to the range as a cattle range.

Counsel for respondent, in their brief, contend that to recognize the defense above mentioned would be tantamount to recognizing adverse possession as a defense and would be tantamount to holding that the sheepmen, by committing trespasses in the past, have acquired a license to commit crime. The defense of adverse possession as such does not apply, nor is it to be conceded for one moment that anyone can acquire the right to commit crime by reason of having committed it in the past. The point is that under this particular statute the question of whether a man is committing a crime by herding his sheep upon a certain range depends upon the character of that range. The character of the range, in turn, depends upon the past acts and attitude of cattlemen and sheepmen in regard to it. The act of the defendant himself, among others, may thus tend to prove the character of the range.

The question of abandonment is, in the first instance, a question of fact for the jury. In our judgment, however, the uncontradicted evidence and the stipulation as to a customary joint use from 1885 until May, 1916, without protest, establishes an abandonment of the range as a cattle range within the meaning of that term as used in the statute. We therefore conclude that the evidence is insufficient to support the verdict of guilty and the judgment of conviction based thereon.

So far as the constitutional questions raised in this case are concerned, they were passed upon by this court in *State v. Horn*, 27 Ida. 782, 152 Pac. 275, and *State v. Omaecheviaria*, *supra*. While the questions involved are close, this court does not see fit to overrule those decisions.

The judgment of conviction is reversed and the case is remanded to the trial court, with direction to take such future action as may appear proper in view of this decision.

Morgan and Rice, JJ., concur.

Argument for Appellant.

(May 21, 1917.)

ANNA HANSON, Appellant, v. FRANK H. MORRISON
and L. J. RAINWATER, Respondents.

[165 Pac. 521.]

PROBATE AND JUSTICE COURTS—ATTACHMENTS UPON LAND—VALIDITY.—
PRIORITY.

1. Real estate may be attached under and by virtue of a writ of attachment issued out of a justice's or probate court.

2. Where real estate was levied upon and attached pursuant to a writ of attachment issued out of the probate court, and judgment was rendered in favor of the attaching creditor and an abstract thereof filed with the clerk of the district court, and thereafter the land was purchased at a sale in execution of such judgment, the interest of the purchaser is prior to a lien obtained by reason of an attachment levied upon the land which was issued out of the district court after the issuance of the writ out of the probate court, but before the rendition of the judgment and the filing of the abstract thereof.

APPEAL from the District Court of the Seventh Judicial District, for Adams County. Hon. Ed. L. Bryan, Judge.

Action on promissory note in which respondents intervened in order to determine priority of attachment liens. Judgment for intervenors. *Affirmed.*

L. L. Burtenshaw, for Appellant.

The first and only lien that can attach to real estate from a justice or probate court attaches and comes by virtue of the docketing of the abstract of judgment in the office of the clerk of the district court, and unless such judgment or the abstract thereof is filed in the office of the clerk of the district court, it never becomes a lien upon real estate. (*Frazier v. Crowell*, 52 Cal. 399; *Beaton v. Reid*, 111 Cal. 484, 44 Pac. 167; *Diefenbach v. Roch*, 112 N. Y. 621, 20 N. E. 560, 2 L. R. A. 829, and notes.)

Opinion of the Court—Morgan, J.

Attachments issuing from justice and probate court do not prorate with those issuing from the district court. (*Kimball v. Raymond*, 9 Ida. 176, 72 Pac. 957.)

An attachment from the justice court does not create a lien upon real estate. (*Wilson v. Madison*, 58 Cal. 1.)

Stinson & McCallum, for Respondents.

The docketing of the judgment or failure to so docket the judgment in no wise affects the lien of the attachment, excepting that in the case of the judgment being docketed, the lien of the attachment merges in the lien of the judgment, and when the judgment is not so docketed, the lien of the attachment remains. (*Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254; *Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256.)

The judgment does not operate so as to release or obliterate the attachment lien. The property attached is still in contemplation of law in the hands of the officer, subject to judgment. The attachment lien still exists so as to confer a priority in the lien of the judgment. (*Anderson v. Goff*, 72 Cal. 65, 1 Am. St. 34, 13 Pac. 73; *Riley v. Nance*, 97 Cal. 203, 204, 31 Pac. 1126, 32 Pac. 315; *Porter v. Pico*, 55 Cal. 165.)

Sale of the real property of a judgment debtor may be had under execution issued out of a justice court. The provisions for execution, relative to the district court and justice court practice, are identical. It is not necessary to file an abstract of the judgment rendered in the justice court. (*Campbell v. Wickware*, 19 Cal. 145.)

MORGAN, J.—It appears that on September 4, 1913, the Council Lumber Company instituted an action against Ira A. Brown in the probate court of Adams county and, on the same day, caused to be issued therein a writ of attachment. Pursuant to the writ, and on the same day, the sheriff levied upon and attached the real estate in controversy, being the property of Brown. Thereafter judgment was rendered against him, and on March 21, 1914, an abstract thereof was filed with the clerk of the district court and execution issued. Pursuant to the execution the sheriff levied upon the prop-

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erty and on April 18, 1914, sold it to respondents. On February 23, 1914, appellant instituted an action against Brown, in the district court of the seventh judicial district, in and for Adams county, and, on the same day, caused to be issued a writ of attachment pursuant to which the sheriff levied upon and attached the real estate in controversy. On May 4, 1914, respondents filed, with the court's permission, their complaint in intervention in that action, setting forth their claim of title to the land and asking that it be adjudged to be prior to the claim of appellant. Appellant demurred to the complaint in intervention; her demurrer was overruled and, having failed to answer, her default was duly entered. Whereupon the court found the facts as above set forth, and on April 12, 1915, rendered judgment as prayed for by respondents. This appeal is from that judgment.

It will be seen that the writ of attachment upon which appellant bases her claim to the property was levied upon the land prior to the filing of the abstract of judgment of the probate court, but subsequent to the issuance of the writ of attachment by that court, and the levy upon the land made pursuant thereto.

The question presented here is: Can real estate be attached pursuant to a writ of attachment issued out of the probate court? To properly determine this question reference must be made to our constitution and statutes conferring jurisdiction and authority upon such courts within this state. Sec. 21, art. 5, of the constitution provides: "The probate courts . . . shall have . . . jurisdiction to hear and determine all civil cases wherein the debt or damage claimed, does not exceed the sum of five hundred dollars, exclusive of interest. . . ."

Sec. 4629, Rev. Codes, provides: "In all civil suits, and within its civil jurisdiction, all proceedings in the probate court, the process, provisional remedies and supplementary proceedings, and the rules of practice, pleading and procedure, shall be the same as is provided by law for justices' courts." Therefore it is necessary to examine the provisions

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of our statutes concerning writs of attachment issued from justices' courts.

Secs. 4686, 4687 and 4688, Rev. Codes, provide when and how writs of attachment may issue from such courts, and nowhere in these sections or, in fact, in the provisions of our entire codes, is it even intimated that land may not be levied upon by authority of a writ of attachment issued out of a justice's court. In fact, the opposite conclusion is to be deduced from sec. 4688, which provides that the writ be directed to the sheriff or any constable of the county, requiring him to attach and safely keep *all of the property* of the defendant, not exempt from execution. Sec. 4689 is: "The sections of this Code providing for attachments out of the District Court, except as in this chapter expressly provided, are applicable to attachment issued out of justices' courts, the necessary changes and substitutions being made therein." Therefore, no prohibition against writs of attachment issued from justices' courts being levied upon land having been made in the said chapter of the code, dealing with provisional remedies, they are authorized to issue such writs under and by virtue of which all property subject to levy pursuant to writs issued from the district court may be attached. There is no statute, or reason, inconsistent with the jurisdiction of justices' courts in this particular. It is true that sec. 4645 provides that parties to an action in a probate or justice's court cannot give evidence upon any question which involves the title to or possession of real property, nor can any issue presenting such question be tried by such court, and where it appears that such question is involved, the probate court or justice of the peace must suspend all further proceedings in the action and certify the same to the district court, but it does not follow that, by issuing a writ of attachment, in execution of which the sheriff levies upon real estate, a probate court, or justice of the peace, will, necessarily, hear evidence upon a question, or try an issue, involving title to or possession of real property. The mere fact that such a writ issues and is levied upon real estate will not change the character

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of the evidence to be introduced at the trial. (*Bush v. Visant*, 40 Ark. 124, 125.)

It is true that under the provisions of sec. 4736, a judgment rendered in a probate or justice's court creates no lien upon the lands of the defendant until an abstract of the same is filed and docketed in the office of the clerk of the district court, but in this action respondents do not claim a lien initiated by the judgment, but rather by the attachment. Where land is attached prior to judgment in the probate or justice's court, the lien thereby created is merged with the lien of a judgment in favor of the attaching creditor, an abstract of which is subsequently filed and docketed, and the lien resulting from such merger has priority as of the date of attachment in the same manner as in case of judgments and attachments procured in actions in the district court. Therefore, when respondents purchased this land at the sale in execution of the judgment rendered in the probate court, they purchased it clear of any claim of appellant arising subsequent to the date of the levy under authority of the writ of attachment from that court, for the levy of the writ of attachment issued out of the district court, upon which appellant bases her claim, was subsequent to the levy relied upon by respondents. (*First Nat. Bank v. Lieuallen*, 4 Ida. 431, 39 Pac. 1108.)

Appellant cites the case of *Wilson v. Madison*, 58 Cal. 1, urging that it supports her contention that a writ of attachment from a justice's court cannot be levied upon land, but that case merely holds that where a writ of attachment has been issued from a justice's court and a levy thereof is made upon land, and before an abstract of the judgment is filed, as provided by law, a homestead declaration upon the premises is filed by the judgment debtor, the land cannot be sold upon execution of the judgment. This is so because, under the laws of California, lands covered by homestead declarations are subject, not to prior attachments, but to prior judgments. This has been held in the case of *McCracken v. Harris*, 54 Cal. 81, where the attachment issued from the district court prior to the declaration of homestead. The court held in that case

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that the declaration having been filed before judgment, it was not subject to the lien of attachment. It is evident, therefore, that the decision in the case of *Wilson v. Madison, supra*, was not based upon the theory that a writ of attachment issued out of a justice's court could not become a lien upon real estate.

The case of *Dewey v. Schreiber Imp. Co.*, 12 Ida. 280, 85 Pac. 921, is also cited by appellant in support of her contention that the probate court had no jurisdiction to issue a writ of attachment to be levied upon real estate. In that case it was held that by sec. 21, art. 5, of the constitution, probate courts were not given power to try or determine cases in equity, and that a statute purporting to confer upon them the power to foreclose mechanics' liens, mortgages and other liens on real property was unconstitutional and void. That decision has no bearing upon this case, because in issuing the writ of attachment the probate court was not proceeding in equity, but was merely making use of a provisional remedy given by the statutes in aid of an action at law.

The judgment appealed from is affirmed. Costs are awarded to respondents.

Budge, C. J., and Rice, J., concur.

(May 23, 1917.)

ADELHAID WOLTER, Respondent, v. B. CHURCH and
THOMAS J. BYRNE, Appellants.

[165 Pac. 521.]

DISMISSAL OF APPEAL—TIME FOR FILING TRANSCRIPT—RULES OF THE COURT—DILIGENCE IN PROSECUTING APPEALS—STIPULATION.

1. A failure to file and serve transcript on appeal within the time specified by the rules of this court does not divest this court of jurisdiction.

2. Where a motion to dismiss for failure to file transcript within the time specified by rule 26 of the rules of this court is made upon

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notice, and a showing is made in opposition to such motion, the showing should be sufficient to justify the court in reinstating the case if it had been previously dismissed without notice.

3. Where upon appeal to this court a transcript has not been filed within the time limited by the rules, such appeal will be dismissed upon motion in the absence of a sufficient showing of diligence. Facts examined and showing of diligence in the prosecution of the appeal held to be insufficient.

4. A stipulation for obtaining an extension of time within which to file transcript on appeal to this court should be obtained before the time limited by the rules of this court for filing such transcript has expired.

APPEAL from the District Court of the Fourth Judicial District, for Lincoln County. Hon. F. J. Cowen, Presiding Judge.

Motion to dismiss the appeal for failure to file transcript within the time prescribed by rule 26 of the rules of this court.
Appeal dismissed.

Bissell & Hellman, for Appellants.

"General rules are binding upon the court as well as upon the parties, except where in the original rule or body of rules there is power to exercise discretion in particular cases." (*Quynn v. Brooke*, 22 Md. 288; *Pratt v. Pratt*, 157 Mass. 503, 32 N. E. 747, 21 L. R. A. 97; *Magnuson v. Billings*, 152 Ind. 177, 52 N. E. 803; *Coyote etc. M. Co. v. Ruble*, 9 Or. 121; *Taylor v. Leesnitzer*, 31 App. D. C. 92; *Royal Neighbors of America v. Sinon*, 135 Ill. App. 599.)

"Rules of court are but means to accomplish the ends of justice, and it is always in the power of the court to suspend its own rules or to except a particular case from their operation, whenever the purposes of justice require it." (*Pickett v. Wallace*, 54 Cal. 147.)

A. L. Fletcher, for Respondent.

An order extending the time within which the transcript on appeal may be filed did not operate as an extension of the time within which to file the transcript, since the time for fil-

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ing had already expired under the rules. It was the duty of the attorneys for appellants, under the statutes and rules of the court, not only to call upon the clerk and ask him if the transcript would be ready within the time prescribed, but it was further the duty of the attorneys for appellants to definitely ascertain from the clerk whether the transcript would be ready within sixty days, and if not, to secure an extension of time. (*Stout v. Cunningham*, 29 Ida. 809, 812, 162 Pac. 928.)

Where the transcript is not prepared and filed in this court within the time and in the manner prescribed by the rules of this court, the appeal upon proper motion will be dismissed. (*First Nat. Bank of American Falls v. Shaw*, 24 Ida. 134, 132 Pac. 802.)

RICE, J.—This cause comes on at this time upon a motion to dismiss the appeal. Several grounds for dismissal are urged, but it will only be necessary to consider the one relating to the failure of the appellants to file and serve transcript within the time limited by rule 26 of the rules of this court.

In this case the judgment was entered by the trial court on the 23d day of October, 1916. The appeal was perfected on the 8th day of January, 1917, and on the 21st day of March this motion to dismiss the appeal was filed. At the time of the motion the transcript had not been filed and served, and no extension of time for filing and serving the same had been applied for or granted.

It has been decided in this state that failure to file and serve transcript on appeal within the time specified by the rules of this court does not divest this court of jurisdiction. (*Stout v. Cunningham*, 29 Ida. 809, 162 Pac. 928.)

By rule 29 such appeal may be dismissed without notice. A case so dismissed may be reinstated during the same term, upon good cause shown, on notice to the opposite party. In cases where the motion to dismiss for failure to file transcript within the time specified under rule 26 is made upon notice, and a showing is made in opposition to such motion, the showing should be sufficient to justify the court in reinstating the

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case if it had previously been dismissed without notice. In the absence of such a showing the case will be dismissed.

The principal showing of diligence in this case consists in setting forth the effort of appellant's attorney to procure the money from one of the appellants with which to pay the clerk and reporter for transcribing the record. The affidavit, however, sets forth that the clerk of the court and the official reporter did not require their fees in advance, but always informed the appellants' attorney that he might get the money from his clients before they would require payment. The affidavit does not state that these officers misled him with regard to the preparation, filing and service of the transcript on appeal.

This showing would have been proper in support of an application for an extension of time within which to file the transcript. It does not present a sufficient excuse for failure to obtain an extension of time within the limit allowed by rule 26. It is not shown that appellants' attorney ever sought to obtain an extension of time within which to file the transcript, nor is it shown that there was any excuse therefor, except that appellants' attorney "may have relied too implicitly upon his past ability to get extensions of time for filing of transcripts, through stipulations with opposing counsel at any time." Unless a valid excuse be shown, an appellant relying upon a stipulation that the time for filing the transcript may be extended must obtain such stipulation before the sixty days expire in order to show due diligence.

In this case we think the showing of due diligence is not sufficient, and that the appeal must be dismissed. Costs awarded to respondent.

Budge, C. J., and Morgan, J., concur.

Points Decided.

(June 11, 1917.)

JAMES CALLAHAN, Appellant, v. HELEN ELIZABETH
CALLAHAN, Respondent.

[165 Pac. 1122.]

BIAS AND PREJUDICE OF JUDGE—CHANGE OF VENUE—SHOWING—SUFFICIENCY OF.

1. When a motion for a change of venue, on the ground of the bias and prejudice of the trial judge, is supported by a sufficient showing, it is the duty of such judge to grant a change of venue, and such duty is mandatory and not discretionary.

2. A direct allegation of the fact of prejudice and bias on the part of a trial judge, based on the belief of affiant, and accompanied by a statement of the facts on which the belief is based as complete as the nature of the case admits of, constitutes a sufficient showing of bias and prejudice, to sustain an order for a change of venue on that ground, and this is particularly true where the trial judge expressly finds that he is disqualified and that sufficient grounds exist therefor.

3. An order granting a change of venue in a cause pending in a district court should, in the absence of an agreement, transfer the cause to the nearest court, judicial district and county, "where the like objection or cause for making the order does not exist," and such order should not designate the judge before whom such cause should be tried.

4. *Held*, order granting a change of venue affirmed, with directions to the trial court to amend same in conformity with the views herein expressed.

[As to application for change of judge or venue on the ground of bias of judge as ousting judge of jurisdiction, see note in *Ann. Cas.* 1916D, 1281.]

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. William W. Woods, Judge.

Appeal from an order granting a change of venue on the ground of the prejudice of the judge. *Affirmed, with directions to amend order.*

Argument for Respondent.

Walter H. Hanson, for Appellant.

Before a change of venue can be granted, or another judge called in upon the application of the moving party to try a case, by reason of the alleged prejudice of the judge of the court in which the action is pending, it must clearly and affirmatively be established by the showing upon which the motion is based, that the judge in question has such a bias or prejudice as will in all probability prevent him from dealing fairly with the party asking the change. (*Higgins v. City of San Diego*, 126 Cal. 303, 58 Pac. 700, 59 Pac. 209; *People v. Findley*, 132 Cal. 301, 64 Pac. 472; *Dakan v. Superior Court*, 2 Cal. App. 52, 82 Pac. 1129; *Bassford v. Earl*, 162 Cal. 115, 121 Pac. 395; *People v. Compton*, 123 Cal. 403, 56 Pac. 44; *In re Smith*, 73 Kan. 743, 85 Pac. 584; *Keating v. Keating*, 169 Cal. 754, 147 Pac. 974; *Bell v. Bell*, 18 Ida. 636, 111 Pac. 1074.)

Whatever knowledge may repose within the breast of the judge must appear by affidavits. Inferences or presumptions arising from the judicial decision in no wise control. The judge must decide upon the facts averred in the affidavit without reference to his own knowledge of his state of mind. (*Bassford v. Earl*, *supra*; *People v. Compton*, *supra*; *Keating v. Keating*, *supra*.)

The court erred in changing the place of trial of said action to the district court of the eighth judicial district instead of to the district court of some adjoining county. (40 Cyc. 116; *Dudley v. Birmingham Ry. etc. Co.*, 139 Ala. 453, 36 So. 700; *State ex rel. Hooten v. McKinney*, 5 Nev. 194; *Armstrong v. Emmet*, 16 Tex. Civ. 242, 41 S. W. 87; *Isenhardt v. Hazen*, 10 Kan. App. 577, 63 Pac. 451.)

The court erred in designating one of the judges of the eighth judicial district to try said cause in said district. (Sess. Laws of 1911, p. 6. amending secs. 3821, 3831, 3834 and 3835, Rev. Codes.)

Harry H. Parsons and Featherstone & Fox, for Respondent.

The granting or refusing of a change of venue lies in the sound discretion of the trial judge, which will not be dis-

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turbed except upon the showing of a clear abuse thereof. Where the moving party makes a clear showing for a change of venue, the granting thereof is mandatory, and the refusal to grant is a manifest abuse of discretion, which will be corrected upon appeal. (*People v. Findley*, 132 Cal. 301, 64 Pac. 472; *Rand, McNally & Co. v. Turner*, 29 Ky. Law Rep. 696, 94 S. W. 643; *Multnomah County v. Willamette Towing Co.*, 49 Or. 204, 89 Pac. 389; *Schilling v. Buhne*, 139 Cal. 611, 73 Pac. 431; *State v. Armstrong*, 43 Or. 207, 73 Pac. 1022; *Ludwick v. Uwarra Min. Co.*, 171 N. C. 60, 87 S. E. 949; *Stockwell v. Haigh*, 23 N. D. 54, 135 N. W. 764; *Kirkwood v. School District*, 45 Colo. 368, 101 Pac. 343; *Crutchfield v. Martin*, 27 Okl. 764, 117 Pac. 194; *Carroll v. Charleston & S. R. Co.*, 61 S. C. 251, 39 S. E. 364; *Jones v. American Central Ins. Co.*, 83 Kan. 44, 109 Pac. 1077; *Day v. Day*, 12 Ida. 556, 86 Pac. 531, 10 Ann. Cas. 260.)

When an affidavit is presented in general terms for such a change, and the court has personal knowledge that he is disqualified to sit, a change of venue ordered by him upon the affidavit, and his own personal knowledge that he is disqualified, cannot be declared erroneous. (*Edwards v. Russell*, 21 Wend. (N. Y.) 68; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114; *Gray v. Crockett*, 35 Kan. 66, 10 Pac. 452.)

This court will draw an inference of the existence of such bias and prejudice of the lower court from the failure of that court to make an affidavit. (*Keating v. Keating*, 169 Cal. 754, 147 Pac. 974; *Bassford v. Earl*, 162 Cal. 115, 121 Pac. 395; *Jones v. American Central Ins. Co.*, *supra*; *Gibbert v. Washington Water Power Co.*, 19 Ida. 637, 115 Pac. 924.)

In *Gordon v. Conor*, 5 Ida. 673, 677, 51 Pac. 747, it appeared that the appellants were entitled to a change of venue, but instead of granting the change of venue the court called in another judge. This court reversed the order of the trial court calling in another judge and ordered that the venue be changed.

BUDGE, C. J.—Appellant instituted an action, in the district court for the first judicial district, in and for Shoshone

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county, for a decree of divorce from respondent. The respondent, after filling her answer and cross-complaint, made a motion for a change of venue, upon the ground that the Honorable William W. Woods, judge of said court, was disqualified, "because of the bias and prejudice of the said Judge," and based her motion upon the records and files in the action, and upon her affidavit, in which she stated: That she had been advised by certain residents of Shoshone county and that she believed, and therefore alleged, that she could not have a fair and impartial trial before said judge, by reason of his friendship for appellant and prejudice against respondent; that appellant had on numerous occasions stated to her that he could win any case in which he was a party before said judge, because of his long friendship and the influence which appellant had over him; that in some actions decisions had been rendered favorable to him, by reason of such influence and friendship; that when decisions had been rendered against him he had lost solely on account of the misconduct of his counsel; that the judge had been for more than thirty years a close and intimate friend and political associate of appellant, and by reason thereof respondent could not have a fair and impartial trial; and that said judge was apprised of certain matters which had taken place between the parties to the action, looking to condonation and settlement, after the suit had been filed, and would be a material witness upon the trial.

At the hearing of the motion counter-affidavits had not been filed, but the substance of the counter-showing, thereafter made and filed, was stated to and considered by the court in making the following order, to wit:

" The Court being fully advised in the premises, and it satisfactorily appearing to the said Judge that he is disqualified from trying the said cause, and that sufficient ground exists therefor,—

"Now, therefore, it is ordered, a change of the place of trial of the said action be and the same hereby is granted, and that the said cause be and the same hereby is transferred to the District Court of the Eighth Judicial District of the State

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of Idaho, and to the Honorable Robert N. Dunn, one of the Judges of the said District Court.”

On appeal from the above order, granting a change of the place of trial, appellant contends: First, that the showing made was insufficient to establish bias and prejudice; second, that if the showing was sufficient, a change of venue should not have been granted, but that another district judge should have been called in to try the case; third, that if the showing was sufficient and the judge was within his rights in ordering a change of venue, that the order is void for insufficiency in that it should have specified the particular county to which the cause was transferred; fourth, that if the showing was sufficient the order was void for the reason that it designated the particular judge, there being two judges in the district to which it was transferred.

Upon the first proposition appellant relies mainly upon the decision of this court in *Bell v. Bell*, 18 Ida. 636, 111 Pac. 1074, which reversed an order granting a change of venue under somewhat similar circumstances, upon the ground that the showing was insufficient, in that it did not recite the facts which were relied upon to establish the existence of prejudice and bias on the part of the judge. In the instant case an examination of the affidavit discloses the facts relied upon to establish the existence of bias and prejudice on the part of the trial judge, which we think are sufficient. (*Booren v. McWilliams*, 33 N. D. 339, 157 N. W. 117; *Faivre v. Mandercheid*, 117 Iowa, 724, 90 N. W. 76; *Morehouse v. Morehouse*, 136 Cal. 332, 68 Pac. 976.) In the latter case it was said:

“But here there is a direct allegation of the fact of prejudice and bias on the part of the judge; and, though the allegation is based—as in most cases it must be based—merely on the belief of affiant, yet it is accompanied by a statement of the facts on which the belief is based, as complete as the nature of the case admitted of; and this was all that could reasonably be required.”

The latter case was quoted with approval in *Bassford v. Earl*, 162 Cal. 115, 121, 121 Pac. 395-398, wherein the order denying the motion for a change of venue was reversed, for

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the reason that there was no affidavit of the trial judge opposing the movant's showing, the court saying:

"If such a statement was necessary in answer to the Bassford affidavit, and not only do we think it was, but from the affidavit of Mr. Wheeler it seems so to have been regarded by the respondents to that motion, the one person, who, with an informed mind, could make such a declaration, was the judge himself, and he does not do so."

The same rule was announced in *Keating v. Keating*, 169 Cal. 754, 147 Pac. 974; *Jones v. American Cent. Ins. Co.*, 83 Kan. 44, 109 Pac. 1077. Not only did the trial judge, in the case at bar, make no such affidavit, but, on the contrary, he expressly finds in his order that he is disqualified and that sufficient ground exists for a change of venue. The order, therefore, was properly granted.

Again referring to the Bell case, it will also be noted that that case was decided in 1910 and that section 4125, Rev. Codes, has been amended by ch. 96, Sess. Laws 1913, p. 385, to read as follows:

"The court *or judge must*, on motion, *when it appears by affidavit or other satisfactory proof*, change the place of trial in the following cases:" (Italics ours.)

In this amendment "may" has been changed to "must" and the other italicized portion has been added. Just what the legislature intended to include in the clause "other satisfactory proof" does not appear. But where the showing is such as appears in this record, and where the trial judge himself has expressly found that he was satisfied of his own disqualification and that sufficient grounds existed for a change of venue, it would not only be unjust to the parties litigant, but it would be an imposition upon the trial judge for this court to compel him to try the case under such circumstances.

The second point urged by appellant is equally without merit, in view of the language of sec. 4126, Rev. Codes, which provides that whenever the judge is disqualified in an action, "it must be transferred for trial to such other court of competent jurisdiction as may be agreed upon by the parties by

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stipulation in writing in open court, and entered in the minutes; or, if they do not so agree, then to the nearest court where the like objection or cause for making the order does not exist." In other words, when a motion for a change of venue, on the ground of the bias and prejudice of the trial judge, is supported by a sufficient showing it is the duty of such judge to grant a change of venue, and such duty is mandatory and not discretionary. (*Gordon v. Conner*, 5 Ida. 673, 51 Pac. 747.)

Keeping the latter section in mind, appellant's third and fourth objections are readily disposed of. It is clear that the parties did not agree by stipulation in writing, entered in the minutes, or otherwise, that the cause should be transferred to any other court, and failing in this, the judge being disqualified, the statute fixes the court to which the cause should be transferred, namely, to another district court and "to the nearest court where the like objection or cause for making the order does not exist." What is the nearest court is a fact of which both the trial court and this court take judicial notice.

The order should have transferred the cause to the district court of the eighth judicial district for Kootenai county, without designating what judge should try the case. That portion of the order which designated the particular judge must be regarded as mere surplusage, in view of sec. 3829, Rev. Codes, as amended by ch. 4, Sess. Laws 1911, p. 6, which provides that the senior judge shall apportion the business of such district among such judges, as equally as may be.

The order appealed from is affirmed, and the trial judge who made the order, is directed to amend the same in conformity with the views herein expressed. Costs awarded to respondent.

Morgan and Rice, JJ., concur.

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(June 12, 1917.)

**F. L. WELLS, Respondent, v. ELLA CROZIER CULP and
LYNN W. CULP, Her Husband, Appellants.**

[166 Pac. 218.]

NEW TRIAL—TRANSCRIPT ON APPEAL.

1. The action of the trial court in overruling motion for new trial, based in part upon the minutes of the court, cannot be reviewed where the record of appeal fails to contain a transcript of the evidence duly settled by the trial judge.

2. A transcript of the evidence not duly certified and settled by the trial judge cannot be considered on appeal, either from the judgment or from the order overruling the motion for new trial.

[As to what proceedings are inconsistent with motion for new trial so as to waive right to move, see note in *Ann. Cas.* 1914B, 612.]

APPEAL from the District Court of the Eighth Judicial District, for Kootenai County. Hon. John M. Flynn, Judge.

Action to foreclose mortgage. Judgment for plaintiff.
Modified and affirmed.

Lynn W. Culp, for Appellants.

F. A. McMaster and Alex Kasberg, for Respondent.

Counsel cite no authorities on points decided.

RICE, J.—This is an appeal from a decree foreclosing a certain mortgage upon property owned by the appellants and from an order of the court overruling appellants' motion for new trial. The motion for new trial was based in part upon the minutes of the court.

The record on appeal purports to contain a transcript of the evidence taken at the trial. It does not appear that this transcript was ever settled by the trial judge or certified by him to be correct. Sec. 4443, Rev. Codes, as amended by 1911 Sess. Laws, p. 378, is as follows: "The judgment-roll and the

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affidavits, or the records and files in the action; . . . as the case may be, used on the hearing, with a copy of the order made, shall constitute the record to be used on appeal from the order granting or refusing a new trial, unless the motion be made on the minutes of the court, and in that case the judgment-roll and a reporter's transcript prepared in the manner prescribed by sec. 4434 of these Codes, with a copy of the order, shall constitute the record on appeal." Sec. 4434, referred to (Sess. Laws 1911, p. 379), requires that the trial judge must settle the transcript of the evidence, and when so settled said transcript shall have the force and effect of a bill of exceptions duly settled and allowed. In the absence of such settlement by the trial judge the purported transcript of the evidence cannot be considered in this court. Having failed to furnish this court with the record used by the trial judge in his consideration of the motion for new trial, his order overruling the same cannot be reviewed on this appeal.

The failure of the record to contain a transcript of the evidence duly certified and settled by the trial judge leaves only the judgment-roll to be reviewed on the appeal from the judgment.

The only assignment of error which is material has to do with the system of computation employed by the court in determining the amount due upon the notes. It is urged that the court erred in the computation as contained in its findings of fact and conclusions of law to the effect that the plaintiff was entitled to recover as principal and interest, exclusive of attorney's fees and costs, the sum of \$2,781.48. Appellants have submitted a computation table showing the computation of interest according to the system used and employed by the court, and the result thereby obtained is \$55.73 less than the result reached by the court. The computation as submitted by appellants has been carefully checked and found to be substantially correct, and this finding of fact and the decree based thereon should be modified to that extent.

Points Decided.

The cause is remanded to the trial court, with instructions to modify the judgment by deducting therefrom the sum of \$55.73, and as so modified the judgment is affirmed. Costs awarded to respondent.

Budge, C. J., and Morgan, J., concur.

Petition for rehearing denied.

(June 12, 1917.)

SAMUEL KEYSER, Doing Business Under the Name and Style of THE AMERICAN GROCERY CO., Appellant,
v. THE CITY OF BOISE, a Municipality Under the Laws of the State of Idaho, Respondent.

[165 Pac. 1121.]

PUBLIC STREET — OBSTRUCTION — PERMIT FOR — REVOCATION — INSUFFICIENT COMPLAINT.

1. The holder of a permit to install an obstruction in a public street or thoroughfare for private purposes acquires no property or contractual right by reason of the issuance to him of such permit, and whenever the city authorities deem it necessary as a police regulation to vacate and revoke such permit, the holder thereof has no alternative, but must comply with the order of revocation.

2. *Held*, that the action of the trial court in sustaining the demurrer to the complaint and dismissing the action was not error.

[As to right of private person to obstruct street temporarily, see note in 1 Am. St. 840.]

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Carl A. Davis, Judge.

Action to enjoin the City of Boise from removing by force a gasoline pump, installed by appellant on a public street, under a permit issued to him by the city. Demurrer to complaint sustained and judgment of dismissal *affirmed*.

Argument for Appellant.

Van W. Hasbrouck, for Appellant.

When the right to use the streets is granted and accepted and all conditions imposed incident to the right performed, it ceases to be a mere license and becomes a valid contract. (4 McQuillin, Mun. Corp., sec. 1616, and authorities cited; 3 Abbott, Mun. Corp., sec. 919, p. 2145, and cases cited; *Village of Madison v. Alton G. & St. L. Traction Co.*, 235 Ill. 346, 85 N. E. 596; *Hasty v. Huntington*, 105 Ind. 540, 5 N. E. 559; *Peoria R. Co. v. Peoria Ry. Terminal Co.*, 252 Ill. 73, 96 N. E. 689; *Workman v. Southern Pacific R. Co.*, 129 Cal. 536, 62 Pac. 185, 316.)

The erection and maintenance of gasoline tanks, and the necessary pump for distributing the gasoline to the public as in the case at bar, are not purely for private purposes, but, on the contrary, are for the purpose of serving the public. (*Savage v. City of Salem*, 23 Or. 381, 37 Am. St. 688, 31 Pac. 832, 24 L. R. A. 787.)

Any failure of the appellant to perform any conditions on his part to be performed, in accordance with the whims of the city's many officers, were wholly conditions subsequent to the vested rights of the appellant. (*Citizens' Horse Ry. Co. v. Belleville*, 47 Ill. App. 388; *People v. Blocki*, 203 Ill. 363, 67 N. E. 809; 3 Abbott, Mun. Corp., pp. 2147-2149, and cases cited.)

"A municipal corporation as well as a private corporation is subject to an estoppel *in pais* for the words, acts or conduct of its officers, as to its business affairs." (*George F. Blake Mfg. Co. v. Chicago Sanitary District*, 77 Ill. App. 287; McQuillin, Municipal Ordinances, sec. 352, and cases cited.)

"A resolution of the council, rescinding its former action, without notice to defendant or opportunity given him to be heard is, in the absence of any public necessity for such action, void as taking property without due process of law." (*City of Buffalo v. Chadeayne*, 7 N. Y. Supp. 501; *United Electric Co. of New Jersey v. City of Bayonne*, 73 N. J. L. 410, 63 Atl. 996.)

Charles F. Reddoch, for Respondent.

The permit was for a purely private purpose, in that it authorized appellant to occupy a portion of one of the public streets of the city with a pump, for the sale of gasoline, and at most it was a mere license, revocable at any time. Appellant acquired no property right by this permit. (3 McQuillin, Mun. Corp., 1319; *Elster v. City of Springfield*, 49 Ohio St. 82, 30 N. E. 274; *City of Denver v. Girard*, 21 Colo. 447, 42 Pac. 662; *Lacy v. Oskaloosa*, 143 Iowa, 704, 121 N. W. 542, 31 L. R. A., N. S., 853; *Hibbard etc. Co. v. Chicago*, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; *Tell City v. Bielefeld*, 20 Ind. App. 1, 49 N. E. 1090; *Winter v. City of Montgomery*, 83 Ala. 589, 3 So. 235; *Ainley v. Hackensack Imp. Commission*, 64 N. J. L. 504, 45 Atl. 807; *Eddy v. Granger*, 19 R. I. 105, 31 Atl. 831, 28 L. R. A. 517; *South Highlands Land Imp. Co. v. Kansas City*, 100 Mo. App. 518, 75 S. W. 383; *City of New York v. United States Trust Co.*, 116 App. Div. 349, 101 N. Y. Supp. 574; *Emerson v. Babcock*, 66 Iowa, 257, 55 Am. Rep. 273, 23 N. W. 656; *Norfolk City v. Chamberlaine*, 29 Gratt. (Va.) 534.)

BUDGE, C. J.—The appellant filed a complaint in the district court, setting up the following facts: That he was conducting a grocery business in Boise City; that respondent is a municipality in Ada county; that on the 4th day of May, 1915, the council of said city passed a resolution, upon his application, permitting and authorizing him to install a gasoline tank for the purpose of selling gasoline to automobilists and others; that pursuant to this permit, and relying thereon, he purchased a gasoline tank and pump and employed a skilled plumber to install the same; that the installation thereof was completed on the 13th day of May, 1915, with the exception of replacing the cement of the sidewalk around it; that during the installation thereof two members of the city council were present and assisted him in lining up the pump with the walk; that one of the councilmen came to him and stated that he was authorized by the council to investigate the

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pump, which he did, and stated to appellant that he would report the matter to the council; that said councilman came back to appellant's place of business and stated that the council objected to the pump, on account of its appearance and the long arm projecting from it; that appellant removed the arm and agreed with the council that he would not use the galvanized iron, which came with the pump, for covering the same, as the council considered it unsightly; that thereafter the council, without any notice to appellant, on the 14th day of May, 1915, held a special meeting, and passed a resolution directing appellant to remove the pump, so installed, within two days from the date of said resolution, and that in the event of his failure so to do, the street commissioner was directed and ordered to remove the pump and place the street in its previous condition, at the expense of appellant; that unless restrained by this court, said resolution would be carried into effect, to the great wrong and injury of appellant, and in violation of his rights under said permit; that the action of the council in ordering the pump removed was without authority of law, and wholly null and void and in violation of appellant's constitutional rights, and deprived him of the right of due process of law; that he had no speedy or adequate remedy at law; that the purported resolution of May 14, 1915, did not state the correct state of facts in that it purported to state that the council directed and instructed appellant not to install an inside pump of the type and character intended to be installed; that, on the contrary, the council never made any objection to the character or the type of pump not being an outside pump until their purported resolution of May 14, 1915; that appellant prior to said date had no notice from the council that the pump was not in accordance with the ordinance of the city or not a proper pump for said purpose; that, on the contrary, the pump and tank were inspected by the chief of the fire department of said city and by members of the city council; that the city and members of its council had ample opportunity to observe, and did observe, the almost complete installation of the tank and pump before the passing of said

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purported resolution on May 14, 1915, where and when appellant first received information, by his voluntary appearance at said council meeting, that the maintenance of the pump would not be permitted; that the council and city have authorized installations, and under said authorizations there have been installed in said city pumps of the same type and character as the pump installed by the appellant; that appellant had performed all the conditions on his part to be performed under said permit, and prayed for a temporary restraining order, restraining the city from the threatened acts, set forth in the complaint, and for an order to show cause why the temporary restraining order should not be made absolute.

Respondent demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action, injunctive or otherwise. The demurrer was sustained, and appellant refusing to plead further, judgment was entered, dismissing the action. This is an appeal from the judgment.

Appellant assigns the following errors: That the court erred in sustaining the demurrer to the complaint, and in rendering judgment in favor of respondent. The only question for this court to determine is, whether or not the complaint states a cause of action.

The authorities dealing with the question raised by the demurrer are conflicting, but we are of the opinion that the sounder rule and the rule supported by the better reasoned cases is to the effect, that the streets, from side to side and end to end, belong to the public, and are held by the municipality in trust for the use of the public. The city is, therefore, without authority, in the absence of a legislative enactment expressly permitting it, to grant a private person or corporation a permit to erect or maintain a permanent obstruction in a public street or thoroughfare for a purely private purpose; we have no such statute in this state. It follows that anyone obtaining a permit from the city, for the private use of a public street, as in this case, takes the same with notice that it is subject to revocation at the will of the city, and, indeed in this view, it matters not whether the use is made in accordance with a permit or without one, the use

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is merely permissive in either event, and revocable at any time without notice. If the person making such private use of a street goes to expense he does so at his own risk, and he will not be heard to complain that his property is being taken without due process of law.

The holder of a permit to install an obstruction in a public street or thoroughfare, for a private purpose, acquires no property or contractual right by reason of the issuance to him of such permit, and whenever the city authorities, in their discretion, deem it necessary as a proper police measure, to vacate and revoke such permit, the holder of the same has no alternative, but must comply with the order of revocation. (3 McQuillin, Mun. Corp., sec. 1319; *Elster v. City of Springfield*, 49 Ohio St. 82, 30 N. E. 274; *City of Denver v. Girard*, 21 Colo. 447, 42 Pac. 662; *Lacy v. Oskaloosa*, 143 Iowa, 704, 121 N. W. 542, 31 L. R. A., N. S., 853; *Hibbard etc. Co. v. Chicago*, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; *City of Tell City v. Bielefeld*, 20 Ind. App. 1, 49 N. E. 1090; *Winter v. City of Montgomery*, 83 Ala. 589, 3 So. 235; *Ainley v. Hackensack Imp. Commission*, 64 N. J. L. 504, 45 Atl. 807; *Eddy v. Granger*, 19 R. I. 105, 31 Atl. 831, 28 L. R. A. 517; *South Highland Land & Imp. Co. v. Kansas City*, 100 Mo. App. 518, 75 S. W. 383; *City of New York v. United States Trust Co.*, 116 App. Div. 349, 101 N. Y. Supp. 574; *Emerson v. Babcock*, 66 Iowa, 257, 55 Am. Rep. 273, 23 N. W. 656; *Norfolk v. Chamberlain*, 89 Va. 196, 16 S. E. 730; *Ely v. Campbell*, 59 How. Pr. (N. Y.) 333.)

It may be that a different rule would apply if the municipality had been given the right to grant such a permit by statute. Some cases have gone to the extent of announcing a rule contrary to the one herein expressed, apparently upon the theory that a municipality has a right, in the absence of a statute authorizing it, to grant an irrevocable license or permit of a private use of the streets, so long as such use does not materially interfere with the use thereof by the public. (3 McQuillin, Mun. Corp., sec. 1319; *City of Buffalo v. Chadeayne*, 7 N. Y. Supp. 501; *Incorporated Town of Spencer v. Andrew*, 82 Iowa, 14, 47 N. W. 1007, 12 L. R. A. 115; *First*

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Nat. Bank v. City of Emmetsburg, 157 Iowa, 555, 138 N. W. 451-456, L. R. A. 1915A, 982; *Smith v. City of Jefferson*, 161 Iowa, 245, Ann. Cas. 1916A, 97, 142 N. W. 220, 45 L. R. A., N. S., 792.)

While the latter view has some very plausible arguments in its favor, we are not in accord with it, for, as indicated above, the former view is supported by the weight of modern authority and by sound legal principle.

The complaint, therefore, does not state a cause of action, and the demurrer was properly sustained. The judgment is affirmed. Costs awarded to respondent.

Morgan and Rice, JJ., concur.

(June 13, 1917.)

NAMPA HIGHWAY DISTRICT, Appellant, v. COUNTY OF CANYON, Respondent.

[165 Pac. 1126.]

COUNTIES—HIGHWAY DISTRICTS—ROADS AND BRIDGES—COST OF CONSTRUCTION AND MAINTENANCE—BONDS—APPORTIONMENT.

1. The board of county commissioners has the power and authority to levy and collect taxes against all the taxable property within the county, including that within a highway district, for the payment of bonds, the proceeds whereof have been used for the construction of bridges within the county but without the boundaries of the district.

2. The provisions of sec. 16, chap. 55, Sess. Laws 1911, p. 129, held to not be applicable to the facts of this case.

[As to validity of statute assessing cost of construction or repair of rural highway on land benefited, see note in *Ann. Cas.* 1913D, 550.]

APPEAL from the District Court of the Seventh Judicial District, for Canyon County. Hon. Chas. P. McCarthy, Presiding Judge.

Action to recover the sum of \$573.75 and to apportion cost of bridges. Judgment for defendant. *Affirmed.*

Argument for Respondent.

F. A. Hagelin, A. L. Anderson and Richards & Haga, for Appellant.

The highway board is substituted for and takes the place of the board of county commissioners with reference to highways within the territory embraced in the district, and it would appear that the power of the board of county commissioners ceases so far as such district highways are concerned. (*Reinhart v. Canyon County*, 22 Ida. 348, 353, 125 Pac. 791.)

The question as to whether or not the county should reimburse the highway district because the construction of such bridges for which the bonds were voted was not a benefit to the highway district, is to be determined as provided by sec. 16 of the act. (*Reinhart v. Canyon County*, *supra*.)

There is no question as to the uniformity of the assessment on any class of subjects in the case at bar. This tax was not levied for governmental purposes, but for the improvement of highways according to benefits. (*Hettinger v. Good Road Dist. No. 1*, 19 Ida. 313, 113 Pac. 721; *Elliott v. McCrea*, 23 Ida. 524, 130 Pac. 785; *Independent Highway Dist. No. 2 v. Ada County*, 24 Ida. 416, 134 Pac. 542.)

A. F. Stone, H. A. Griffiths and Scatterday & Van Duyn, for Respondent.

A statute which contains no provision for determining benefits is inoperative. (2 *Elliott on Roads and Streets*, p. 43, sec. 693, note 51; *Road Improvement Dist. v. Glover*, 89 Ark. 513, 117 S. W. 544; *Hettinger v. Good Road Dist. No. 1*, 19 Ida. 313, 113 Pac. 721.)

The theory upon which assessments are sustained is that the party assessed is locally and peculiarly benefited over and above the ordinary benefits which, as one of the community, he receives in all such improvements. (Page & Jones on *Taxation by Assessments*, p. 21; *Wilson v. Board of Trustees of Sanitary District of Chicago*, 133 Ill. 443, 27 N. E. 203.)

Therefore, such benefits are the only benefits that are susceptible of apportionment herein, and if the plaintiff has attempted, as it has in fact attempted in this case, to appor-

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tion general benefits, it is basing its action upon the wrong principle.

MORGAN, J.—This action was commenced by appellant, a highway district, for the purpose of causing to be apportioned between it and Canyon county, the respondent, of which the district is an integral part, the cost of construction of three bridges situated in the county and outside of the district. Money with which to pay for building the bridges was procured by the issuance and sale of county bonds. It appears that a uniform tax has been levied upon all taxable property in the county for the purpose of raising money with which to pay the interest on the bonded indebtedness thus created, and that the sum of \$573.75 has been collected for that purpose from the owners of property within the district.

It is appellant's contention that neither the inhabitants of the district nor the property situated therein are benefited by the construction or maintenance of the bridges, and it is sought, in this action, to procure a decree to that effect and to recover the money heretofore paid, as above mentioned.

A trial was had before the court without a jury, which resulted in a judgment in favor of defendant dismissing the action, from which this appeal has been taken.

Appellant was created and is operating under and by virtue of chap. 55, Sess. Laws 1911, p. 121, the purpose of which act is to make possible the creation of highway districts with power to establish and maintain their own system of roads, and to that end provision is made for the collection, by the county wherein such a district is situated, of taxes for road and bridge purposes and the payment of the money so collected, except a small percentage thereof, to the highway district.

The statutory enactments providing the means by which taxes levied for road and bridge purposes shall be collected and apportioned between the county and highway district have been fully discussed in case of *Reinhart v. Canyon County*, 22 Ida. 348, 125 Pac. 791, wherein this same bond issue was called in question by a property owner of appel-

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lant, and the court there said that the principal question presented for determination was: "Has the board of county commissioners the power to bind the property and levy taxes against the property within a legally organized highway district for the payment of bonds issued by the county after the organization of such highway district, the proceeds to be used in the construction of a bridge within the county but without the boundaries of such highway district?" That question was answered by the court in the affirmative, and it said: "We think it is clear under the provisions of said highway district act and the statute concerning the issuance of bonds for the construction of bridges, that in a case like the one at bar the board of county commissioners has the power and authority to levy the tax upon all of the property within the county for the payment of such bonds and the interest thereon."

Appellant relies for its right to recover upon the provisions of sec. 16, chap. 55, Sess. Laws 1911, p. 129, which is as follows:

"In case the construction, maintenance, repair or improvement of any highway, or portion thereof, within a county and not included within a highway district in such county, would also be for the benefit of such highway district, and the cost of such construction, maintenance, repair or improvement would if borne wholly by such excluded portion, be an unjust or unreasonable burden thereon, or in case the construction, maintenance, repair or improvement of any highway, or portion thereof, within a highway district would also be for the benefit of a portion or portions of such county which are not included in such highway district, and the cost of such construction, maintenance, repair or improvement would, if borne wholly by such highway district, be an unjust or unreasonable burden thereon; in either of such cases the Highway Board on the one hand, and the Board of County Commissioners on the other, shall have power to contract each with the other for a division and apportionment of the cost of such construction, maintenance, repair or improvement. And in case they fail to agree an action may be main-

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tained in the District Court of the district, between such highway district and the county, and the District Court shall render such judgment therein as shall be just and equitable in respect to such division and apportionment of cost; and all proceedings in such action shall be the same as in ordinary civil actions, with the same right of appeal and other rights and remedies as in an ordinary civil action or against a body politic or political subdivision.”

A careful reading of the foregoing section will disclose that it does not apply to this case. That law is intended for the relief of the portion of a county not organized into a highway district in case road or bridge construction or improvement is undertaken outside the boundaries of the district, by providing that the district may contribute, or be required to do so, in a manner not otherwise provided by law toward the expense of such improvement; also that in the event such improvement be within the district, but beneficial to other portions of the county, and the cost thereof is such that it would be an unjust or an unreasonable burden upon the district the county may likewise assist, or be required to do so, in a way it could not otherwise do.

Neither of these conditions presents itself here. The bridges, for the construction of which this bonded indebtedness was created, are outside the district, so that is not a case for contribution under the law from respondent in aid of appellant. The expense of construction is not claimed to be an unjust or unreasonable burden upon the county, and it is not asking for contribution from appellant.

Since, as held in *Reinhart v. Canyon County*, *supra*, the county commissioners have power and authority to levy a tax upon all taxable property within the county, including that within the highway district, for the payment of the bonds and the interest thereon, and since the provisions of sec. 16, *supra*, do not apply to this case, the action cannot be maintained.

The judgment of the trial court is affirmed. Costs are awarded to respondent.

Budge, C. J., and Rice, J., concur.

Argument for Appellant.

(June 13, 1917.)

J. P. NELSON, Respondent, v. MCGOLDRICK LUMBER COMPANY, Appellant.

[165 Pac. 1125.]

DEFAULT—MOTION TO VACATE—SUFFICIENCY OF SHOWING—APPEAL FOR DELAY—DAMAGES.

1. Where it clearly appears that a default was permitted to be entered through the carelessness and negligence of a party, or his counsel, for which no reasonable excuse is offered, it will not be vacated upon the theory that it was taken against him through his mistake, inadvertence, surprise or excusable neglect.

2. Under rule 44 of the rules of practice in this court, damages may be allowed to respondent in an amount not to exceed twelve per cent of the judgment, where it manifestly appears the appeal has been taken for delay.

[As to vacating of judgments on account of negligence or mistake of attorney, see note in 96 Am. St. 108.]

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. William W. Woods, Judge.

Action to recover for labor performed and services rendered in cutting and hauling certain cedar poles. Default for failure to answer was entered and from a judgment in favor of plaintiff and an order denying a motion to vacate the default, defendant appeals. *Affirmed.*

Cullen, Lee & Matthews, and Featherstone & Fox, for Appellant.

Statutes relating to the vacating of default judgments should receive a most liberal construction. (6 Ency. Pl. & Pr., 154; *Walsh v. Boyle*, 94 Minn. 437, 103 N. W. 506; *Lemon v. Hubbard*, 10 Cal. App. 471, 102 Pac. 554; *Hull v. Vining*, 17 Wash. 352, 49 Pac. 537.)

A default was set aside by this court in the following cases: *Pease v. County of Kootenai*, 7 Ida. 731, 65 Pac. 432; *Estate*

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of Pittock, 15 Ida. 47, 96 Pac. 212; *Shumake v. Shumake*, 17 Ida. 649, 107 Pac. 42; *Parsons v. Wrble*, 19 Ida. 619, 115 Pac. 8.

Every reasonable doubt in such cases will be resolved in favor of a trial upon the merits. (*Humphreys v. Idaho Gold Mines Dev. Co.*, 21 Ida. 126, 120 Pac. 823, 40 L. R. A., N. S., 817; *Coleman v. Security Savings Soc.*, 57 Wash. 675, 107 Pac. 842; *Reitmeir v. Siegmund*, 13 Wash. 624, 43 Pac. 878; *Hermance v. Cunningham*, 49 Neb. 897, 69 N. W. 311; *Griswold Linseed Oil Co. v. Lee*, 1 S. D. 531, 36 Am. St. 761, 47 N. W. 955; *Horton v. New Pass Gold & Silver Min. Co.*, 21 Nev. 184, 27 Pac. 376, 1018; *Howe v. Coldren*, 4 Nev. 171; *Rosebud Lumber Co. v. Serr*, 22 S. D. 389, 117 N. W. 1042; *Ordway v. Suchard*, 31 Iowa, 481.)

Wm. D. Keeton and E. N. La Veine, for Respondent.

The laches and delays in this case do not constitute any mistake, surprise, inadvertence or any neglect which can be excused. Neglect to be in a position to answer seventy-six days after the defendant had been served with summons and complaint does not come within neglect which should be excused by a court, nor does it show diligence on the part of appellant. The appellant does not show that it made any mistake, or that it was surprised. It was not misled or deceived in any way. (*Morbeck v. Bradford-Kennedy Co.*, 19 Ida. 83, 113 Pac. 89.)

There is no press of business shown which is excusable, and no excuse for the laches in this case is presented by the showing of the appellant. (*Bailey v. Taaffe*, 29 Cal. 422, 423; *Bowen v. Webb*, 34 Mont. 61, 85 Pac. 739; *Scilley v. Babcock*, 39 Mont. 536, 104 Pac. 677; *Lovell v. Willis*, 46 Mont. 581, Ann. Cas. 1914B, 587, 129 Pac. 1052, 43 L. R. A., N. S., 930; *Brumbaugh v. Stockman*, 83 Ind. 583; *Church v. Lacy*, 102 Iowa, 235, 71 N. W. 338; *Hall v. Whittier*, 20 Ida. 120, 116 Pac. 1031.)

There is no justice in permitting one party to obtain an undue or unfair advantage through neglect or mistake of the

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other's attorney. (*Jones v. Vane*, 11 Ida. 353, 363, 82 Pac. 110.)

MORGAN, J.—This action was commenced on September 10, 1915. On October 7th, appellant filed a demurrer to the complaint, which was overruled on November 1st, and appellant was given twenty days in which to answer. By stipulation the time was extended to and including November 27th, and on December 2d, no answer having been filed, the default of appellant was entered. On December 15th, no other or further appearance having been made, respondent offered proof in support of the allegations of his complaint and was awarded judgment in the sum of \$523.43 and costs.

On January 19, 1916, appellant caused to be served upon counsel for respondent a motion and notice of motion to vacate the default and for permission to answer, together with an affidavit in support thereof, and a proposed answer to the complaint. These papers were filed on January 31st, at which time the motion was heard and denied. This appeal is from the judgment and from the order denying the motion.

The assignments of error bring before us for review the showings made in support of and in opposition to the motion above mentioned and the action of the trial court thereon.

It appears from the affidavit of W. J. Matthews, of counsel for appellant, that it was necessary, in order to ascertain the facts from which to prepare an answer, to confer with J. F. Armfield, appellant's codefendant; that some difficulty was encountered in locating Armfield, and that on November 13th, it was found he was in Pullman, Washington; that, although affiant communicated with him, both by telephone and letter, and offered to pay all expenses of the trip if he would go to Spokane, Washington, where affiant resided, in order to confer with counsel for appellant relative to the facts in the case, he declined to do so, and it was not until on or about November 29th that appellant received a letter from him purporting to give the necessary information, and that because of this fact it was impossible to file the answer at an earlier date. It further appears from this affidavit that the answer was actually prepared by affiant prior to November 27th, and

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that some delay was occasioned because it was desired that the verification thereto be made by Roy Lammers, manager of appellant, who was absent from Spokane and who had knowledge of the matters therein alleged.

Aside from the contradictory statements contained in this affidavit, by reason of which it is not very persuasive, it does not state facts sufficient to invoke the benefits of sec. 4229, Rev. Codes, wherein it is provided: "The court may . . . relieve a party, or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect."

While the answer in this case was due on November 27th, it conclusively appears that no effort whatever was made to procure a further extension of time, nor was counsel for respondent communicated with upon the subject by counsel for appellant until December 6th, four days after the default had been entered, nor does any reason appear why such extension was not applied for. The record before us, taken as a whole, does not show that the default was permitted to be entered through the mistake, inadvertence, surprise or excusable neglect of appellant, or of its counsel, but does disclose that it was due to carelessness and negligence for which no reasonable excuse was offered. The rule that defaults will not be vacated under such circumstances has long been well established in this state. (*Domer v. Stone*, 27 Ida. 279, 149 Pac. 505, and cases therein cited.)

From the facts disclosed in this record it manifestly appears that this appeal is entirely without merit, and was taken for delay. Damages in the sum of \$62.81, being 12% of the amount of the original judgment, exclusive of costs, will therefore be allowed to respondent under rule 44 of the rules of practice in this court. (*Wilds v. Brown*, 27 Ida. 218, 148 Pac. 469.)

The trial court is hereby directed to amend the judgment by adding thereto the said sum of \$62.81. The order appealed from and the judgment, so amended, are affirmed. Costs are awarded to respondent.

Budge, C. J., and Rice, J., concur.

Points Decided.

(June 15, 1917.)

BOISE CITY, a Municipal Corporation, Respondent, v.
NATIONAL SURETY COMPANY, a Corporation,
Appellant.

[165 Pac. 1131.]

SEWER CONSTRUCTION CONTRACT WITH CITY—BREACH OF CONTRACT—
COMPLETION OF CONTRACT BY CITY—MEASURE OF DAMAGES—SAL-
ARIES OF CITY OFFICIALS AS ITEM OF DAMAGE.

1. Where a party is damaged by breach of a construction contract by the failure of the contractor to complete it, the measure of damages is the cost necessarily and reasonably incurred in completing the contract, whether he does the work himself or employs others to do it for him.

2. Where sewers have been constructed for a municipality and accepted upon condition that the contractor would, upon notice, repair or relay any portion of said sewer should the same prove to be defective, and where thereafter a portion of the same is found to be defective and notice thereof is duly given and the municipality is compelled to repair and complete the system, it is entitled to recover, upon the bond, all amounts necessarily expended upon the portion of the work included in the notice, for materials, labor and salaries of regularly employed officials actually engaged upon such work.

3. *Held*, that the judgment in this case must be modified, so as to include only such sums for cost of materials, labor and salaries of regularly employed city officials, actually engaged upon the work, as were devoted to the portion of the work included in the notice.

[As to validity of statute providing for recovery of attorneys' fees in action for collection of special assessment, see note in *Ann. Cas.* 1912A, 692.]

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Carl A. Davis, Judge.

Action upon a surety bond brought by Boise City against the National Surety Company, as surety for the Reliance Construction Company. Judgment for plaintiff. *Modified.*

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V. P. Coffin, for Appellant.

The proper measure of damages to be applied to this case is the cost of making the repairs specified. But in making these repairs the city acted under the duty of doing the work at the reasonable cost thereof, and of using such facilities as it might have to do so as cheaply as possible. This duty rests upon the city under the general rule that a party injured by breach of contract is bound to use all reasonable means available to minimize damage. (8 R. C. L. 442.)

J. P. Pope and S. L. Tipton, for Respondent.

There is a line of cases which is quite analogous to this case. These cases involve the question as to whether a city can include in the cost of a public improvement the services of regular salaried employees as a part of the special assessment against the property in the district. (*Gibson v. City of Chicago*, 22 Ill. 566; *Cuming v. Grand Rapids*, 46 Mich. 150, 159, 9 N. W. 141; *Beniteau v. Detroit*, 41 Mich. 116, 1 N. W. 899.)

BUDGE, C. J.—The Reliance Construction Company, of Portland, Oregon, between May, 1912, and June, 1913, under contract with the respondent constructed a sewer system in Boise, which when completed was accepted conditionally by the city, the latter reserving the right, within a period of twelve months from date of the acceptance, upon ten days' notice to the contractor, to require certain portions of said sewer system to be relaid or repaired. The acceptance was contained in a resolution of the city council which required the company to give a bond in the sum of five thousand dollars for the faithful performance of the repairs. This bond was given, with appellant as surety. The condition of the bond, so far as material, is as follows:

"Whereas, the City Council of Boise City, Idaho, on the 31st day of May, 1913, adopted resolution No. 239 by which said sewer system was accepted conditionally to the effect that the contractor be required upon ten days' notice, within the

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period of twelve months, to do such further work in the repairing of said sewer system, so as to make the same acceptable to the Council of said City."

On November 19, 1913, there were transmitted to the Reliance Construction Company a copy of a resolution of the city council, requiring the city engineer to specify what was necessary to complete the system, and make it acceptable to the city; together with a letter from the engineer designating certain portions of the sewer as "needing to be re-cemented."

After this notice was duly given, the work specified in the letter was not done by the company to the satisfaction of the council, and the city performed the necessary work and brought this suit against the appellant upon the bond for reimbursement. A statement of the costs and expenses incurred by the city was in substance as follows:

"1. Material.....	\$ 298.84
2. Labor account.....	1,606.24
3. Salaries of salaried employees of the City during the time that they were engaged upon this work:	
A. M. Ashline.....	\$609.60
J. M. Hollister.....	85.35
Robert Stevenson.....	156.35
	<hr/>
	\$851.30 851.30

Total.....\$2,756.38"

The case was tried before the court without a jury, and upon its findings of fact and conclusions of law judgment was rendered for the respondent in the sum of \$1,536.25. From which judgment this appeal was taken. Appellant assigned the following errors:

"1. That the evidence relating to the item of \$1,606.24, for labor is insufficient to support and does not authorize a judgment against the appellant on account of said labor in excess of forty-five (45) per cent of said amount, or \$722.81.

"2. That the evidence relating to the item of \$851.30 for salaries of regular salaried employees of the City of Boise is

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insufficient to support and does not authorize a judgment against the appellant on account thereof in any sum of money whatever.

“3. That the evidence is insufficient to support and does not authorize a judgment against the appellant in excess of the following, to-wit:

Material.....	\$ 798.84
Labor.....	722.81

Total.....\$1,021.65”

The evidence shows that only forty-five per cent of the time and labor devoted to the work of completing the system was expended by the city upon the work specified in the notice contained in the letter from the city engineer to the Reliance Construction Company. This would reduce the labor account to the sum of \$722.81. Appellant admits its liability for this amount, and for the amount specified for material, to wit: \$298.84, but contends that the items totaling \$851.30, included in the third subdivision of the statement above quoted and covering salaries of salaried employees of the city during the time they were engaged upon the work, was improperly included in the expenses incurred by the city in making the repairs, and seeks to defeat the recovery of these items under the rule “that a party injured by breach of contract is bound to use all reasonable means available to minimize the damage.” Appellant says in its brief:

“Recognizing this rule, the city employed upon this work three of its regular salaried employees, and thus materially reduced the cost to it of making the repairs. We believe that this reduction in the cost to the city of doing this work should lawfully inure to the benefit of the appellant, and that therefore the salaries of these employees during the time they were engaged upon the work is not a lawful charge against appellant.”

With this position we are not in accord, the theory upon which sums expended in an effort to minimize or mitigate damages are recoverable is, that they are expended for the benefit of and in the interest of the party causing the dam-

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age. It is immaterial whether a party damaged by a breach of contract completes the work himself or employs others to complete it for him. The measure of his damages is the reasonable cost incurred in completing the work contracted to be done, according to the terms and provisions of the contract. And in this case the measure of damages would be the same whether the work was done by the employees of the city or by some third party under its direction. (*Newton v. Devlin*, 134 Mass. 490; *George A. Fuller Co. v. Doyle*, 87 Fed. 687-693; *Owen v. Giles*, 157 Fed. 825, 85 C. C. A. 189.)

The use by the city of regularly salaried employees in completing this work and making the necessary repairs, so far as the same were included within the notice, may be likened to the situation of a party who does the necessary work in mitigation of damage himself rather than employ others to do it for him. There is no rule of law which requires one to do another's work for a less wage than would be required to employ someone else to do the same work in a like manner. The charge for salaries of these regular employees of the city was properly included as an item of expense. But as has already been noted, according to the testimony on behalf of respondent, only forty-five per cent of the time was devoted to the work specified in the notice. Upon this basis respondent would only be entitled to include in this item forty-five per cent of the salary item, or \$382.09. The sums, then, for which respondent was entitled to judgment are as follows:

1. Material.....	\$ 298.84
2. Labor account.....	722.81
3. Salary account.....	383.09

Total.....	\$1,404.74
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It is impossible to determine from the record or from the findings upon what theory the trial court arrived at the sum of \$1,536.25, for which judgment was rendered; the findings are not specific. The findings and judgment should be modified in accordance with the views herein expressed, and it is so ordered. Costs awarded to appellant.

Morgan and Rice, JJ., concur.

Argument for Appellant.

(June 16, 1917.)

CITIZENS' STATE BANK OF SANDPOINT, a Corporation, Appellant, v. HEGBERT E. THOMASON, Respondent.

[167 Pac. 22.]

PROMISSORY NOTE—CONDITIONAL DELIVERY—EVIDENCE.

1. Evidence examined and held insufficient to establish respondent's claim that there was a conditional delivery of the note.
2. Evidence examined and held sufficient to establish that the note was delivered as a present obligation.

[As to the necessity that a note, in order to be negotiable, shall be an unconditional promise to pay, see note in 42 Am. Rep. 366.]

APPEAL from the District Court of the Eighth Judicial District, for Bonner County. Hon. R. N. Dunn, Judge.

Action on promissory note. Judgment for defendant. *Reversed.*

H. H. Taylor, for Appellant.

Parol agreements, varying the terms of the subscription to stock, and the note such as testified to by the respondent are inadmissible. (*American Gas etc. Co. v. Wood*, 90 Me. 516, 38 Atl. 548, 43 L. R. A. 449, and notes; *Hurt v. Ford*, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823; *Williams v. Mt. Hood Ry. etc. Co.*, 57 Or. 251, Ann. Cas. 1913A, 177, 110 Pac. 490, 111 Pac. 17; *Shriner v. Meyer*, 171 Ala. 112, Ann. Cas. 1913A, 1103, 55 So. 156; *Loomis v. New York Central etc. R. Co.*, 203 N. Y. 359, Ann. Cas. 1913A, 928, 96 N. E. 748.)

Whether respondent contends that Selzer & Taylor were principals or agents of the Western States Life Insurance Co., a conditional or contingent delivery could not be made to them as principals or agents as it would become an absolute delivery. (3 R. C. L. 860, 861, 862.)

While a conditional delivery may be shown as between the original parties, parol evidence cannot be introduced to show

Argument for Respondent.

a conditional delivery except as between the original parties. (*Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. ed. 700; note, 3 Ann. Cas. 561.)

Evidence of oral agreements made prior to the signing of a note and subscription such as this is not admissible to vary the terms of the written agreement, and the note and subscription taken together constitute the written agreement herein. (*Fralick v. Mercer*, 27 Ida. 360, 148 Pac. 906; *Smith v. Wallace National Bank*, 27 Ida. 441, 150 Pac. 21.)

G. H. Martin, for Respondent.

An instrument may be delivered to the payee on condition, the observance of which is essential to its validity. (Rev. Codes, sec. 3473; 3 R. C. L. 863, and cases there cited; *Beach v. Nevins*, 162 Fed. 129, 89 C. C. A. 129, 18 L. R. A., N. S., 288; *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. ed. 700; *McFarland v. Sikes*, 54 Conn. 250, 1 Am. St. 111, 7 Atl. 408.)

Evidence is properly received that a note executed because of a certain agreement between the payee and maker that until certain acts were done, the transaction should not be deemed completed and the note enforceable. (*Hughes v. Crooker*, 128 Am. St. 611, 612, note.)

By contemporaneous parol agreements, it may be shown that a note executed and delivered is not to be enforced as a present contract, as a defense to a suit upon the note. (*Faux v. Fidler*, 223 Pa. 568, 132 Am. St. 742, 72 Atl. 891; *Kessler v. Parelius*, 107 Minn. 224, 131 Am. St. 459, 119 N. W. 1069; *Gandy v. Weckerly*, 220 Pa. 285, 123 Am. St. 691, 69 Atl. 858, 18 L. R. A., N. S., 434; *Carroll v. Nodine*, 41 Or. 412, 93 Am. St. 743, 69 Pac. 51; *Citizens' Bank v. Millett*, 103 Ky. 1, 82 Am. St. 546, 44 S. W. 366, 44 L. R. A. 664; *Sloan v. Gibbes*, 56 S. C. 480, 76 Am. St. 559, 35 S. E. 408; Jones on Evidence, 2d ed., secs. 471-495; *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. 174, 32 L. ed. 563; *Smith v. Dotterweich*, 200 N. Y. 299, 93 N. E. 985, 33 L. R. A., N. S., 892; *Benton v. Martin*, 52 N. Y. 570.)

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RICE, J.—This is an action upon a promissory note in the sum of \$2,500, executed by Hegbert E. Thomason, respondent herein, payable to himself and indorsed and delivered by him to Selzer & Taylor, who subsequently indorsed and delivered the note to the appellant herein.

The respondent denied that the note was executed and delivered unconditionally for value. As an affirmative defense respondent alleged that prior to the signing, indorsing and delivery of the note, said Selzer & Taylor agreed to and with him that they had for sale and delivery certain shares of the capital stock of a corporation known as the Western States Life Insurance Company, and that they offered to sell to respondent one hundred shares thereof for \$2,500; that respondent advised them that if he should make a prospective sale of certain mining properties located at Jarbridge, Nev., he would purchase one hundred shares of said stock at \$25 per share; that he would execute and deliver the note in suit in this case upon condition that the purchase of said stock and execution and delivery of said note therefor should not be treated or deemed as a present contract; that if said mining deal at Jarbridge, Nev., fell through, this respondent should not be required to take said stock and pay therefor, and that if at any time prior to the maturity thereof the respondent desired to withdraw from the purchase of said stock and the payment therefor as evidenced by said note, the respondent should notify Selzer & Taylor to that effect, and that respondent's agreement to purchase said stock should not thereafter be enforceable, but should be canceled and said note returned to him. Respondent further alleged that the mining deal on the Jarbridge property fell through; whereupon he elected not to complete the purchase of said stock, nor to take the same or to pay therefor, and notified Selzer & Taylor of such election.

The evidence in support of the affirmative defense is that of Thomason, the maker of the note, and is as follows:

"Selzer & Taylor came over several times to see me in regard to selling stock, and I told them I was not financially able to buy any stock for the reason that I had gone into a

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mining deal at Jarbridge, Nev., and that I had tied up all my idle capital in that. They finally came again and made me this proposition. Well, before they left the last time I told them I had a prospective sale on for the mining property and if that went through I would be able to handle some stock. So they left; and they came back once more and told me they had a proposition to make me which was that they would sell me stock and take my note in payment for it, due in six months. I considered a while and finally told them I would subscribe under these conditions, but with this understanding—that my note was to be sent to the home office in San Francisco and left there until such time as I was able to pay it or care for it. . . . They agreed to that and I requested that the note be sent there and left there and not negotiate it or send it to anyone at Sandpoint for collection, to which they agreed.”

He also testified that the above conversation was had before the execution of his note.

The foregoing testimony does not establish respondent's claim that there was a conditional delivery of the note. On the contrary, it does establish that the note was delivered as a present obligation. That the respondent himself treated it as given in payment for the stock is shown by his letter to Selzer & Taylor, written after his failure to sell the Jarbridge property, which letter in part reads as follows: “I will not be able to take the stock that I subscribed for in the Western States Life Ins. Co., and therefore write to request that you resell it, as promised me in event that I wished to have you do so.” This letter did not request the return of the note, but was in effect a confirmation of the purchase of the stock.

Respondent did not allege as a defense, fraud, duress or undue influence. There was therefore no defense against the collection of the note.

At the close of the evidence, the plaintiff requested the court to instruct the jury to render a verdict in its favor, which motion was denied by the trial court. This motion should have been granted.

Points Decided.

The appellant has assigned several specifications of error, but in view of the evidence as outlined above we deem it unnecessary to consider them.

The judgment is reversed, and the lower court is directed to enter judgment for the plaintiff for the amount of the note. Costs awarded to appellant.

Budge, C. J., and Morgan, J., concur.

Petition for rehearing denied.

(June 16, 1917.)

AARON ANDERSON, Respondent, v. COUNCIL LUMBER COMPANY, a Corporation, Appellant.

[165 Pac. 1124.]

LOGGING CONTRACT—CONFLICT IN EVIDENCE CONCERNING PERFORMANCE
QUESTION OF FACT FOR JURY—SUBSTANTIAL COMPLIANCE.

1. The question of the number of logs delivered under an oral contract is a question of fact for the jury to determine under all of the facts and circumstances in evidence.

2. *Held*, that the jury were justified under the evidence in this case in finding that respondent substantially complied with his part of the contract.

3. A party who has failed to perform in full his part of a contract to deliver logs may recover compensation for the logs actually delivered according to the contract price, less damages, if any, occasioned by his failure to fully complete the contract.

[As to entirety of contracts and when complete performance is essential to cause of action *ex contractu*, see note in 59 Am. St. 277.]

APPEAL from the District Court of the Seventh Judicial District, for Adams County. Hon. Ed. L. Bryan, Judge.

Action on contract. Judgment for plaintiff. *Affirmed*.

Argument for Respondent.

James A. Stinson, for Appellant.

No time being named when respondent was to be paid, it must be taken, as a matter of law, that he was to be paid when he had fully completed his contract and not before. (*Waite v. C. E. Shoemaker & Co.*, 50 Mont. 264, 146 Pac. 736.)

Respondent thus brings himself and his action clearly within the provisions of sec. 4212, Rev. Codes.

The theory of respondent's pleading and proof on the trial, was that of action upon an express contract, claiming the performance of conditions precedent thereunder, and on the trial he utterly failed to prove performance of such conditions, but in fact proved the contrary. He failed to support the allegations of his complaint and the trial court should have sustained appellant's motion for judgment of nonsuit and it was reversible error to deny such motion. (*Hannan v. Greenfield*, 36 Or. 97, 58 Pac. 888; *Young v. Stickney*, 46 Or. 101, 79 Pac. 345.)

Appellant relied solely for its defense in this action upon the fact that the respondent had not completed his contract with the appellant, and under the pleading and theory of respondent, appellant had full right to rely upon said defense. (*First Baptist Church v. Sigwald*, 39 Kan. 387, 18 Pac. 289; *Richardson v. Investment Co.*, 66 Or. 353, 133 Pac. 773; *Long Creek Building Assn. v. State Ins. Co.*, 29 Or. 569, 46 Pac. 366; *Morris v. Hokosona*, 26 Colo. App. 251, 143 Pac. 826.)

L. L. Burtenshaw, for Respondent.

"A party who has failed to perform his contract in full to deliver logs may recover compensation for the logs delivered according to the contract price, less damages occasioned by his failure to complete the contract." (*Huber v. Blackwell Lbr. Co.*, 27 Ida. 373, 148 Pac. 903; *McDonough v. Evans Marble Co.*, 112 Fed. 634, 50 C. C. A. 403, 6 R. C. L. 983; *Goodwin v. Merrill*, 13 Wis. 658; *Easton v. Jones*, 193 Pa. 147, 44 Atl. 264; *Gill v. Johnstown Lbr. Co.*, 151 Pa. 534, 25 Atl. 120.)

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A substantial compliance is all that is required from one who contracts with another, and the question as to whether a contract has been substantially performed is generally one of fact. (*Pitcairn v. Philip Hiss Co.*, 113 Fed. 492, 51 C. C. A. 323; *Elizabeth v. Fitzgerald*, 114 Fed. 547, 52 C. C. A. 321; *Fitzgerald v. La Porte*, 64 Ark. 34, 40 S. W. 261; *West v. Suda*, 69 Conn. 60, 33 Atl. 1015; *Bauer v. Hindley*, 222 Ill. 319, 78 N. E. 626; *Loh v. Broadway Realty Co.*, 77 N. J. L. 112, 71 Atl. 112; *Johnson v. De Peyster*, 50 N. Y. 666; *Philip v. Gallant*, 62 N. Y. 256; *Woodward v. Fuller*, 80 N. Y. 312; *Nolan v. Whitney*, 88 N. Y. 648; *Foeller v. Heintz*, 137 Wis. 169, 118 N. W. 543, 24 L. R. A., N. S., 350.)

Substantial performance is performance except as to unsubstantial omissions, with compensation therefor. (*Spence v. Ham*, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238; *Peterson v. Pusey*, 237 Ill. 204, 86 N. E. 692; *Harlan v. Stuffebeam*, 87 Cal. 508, 25 Pac. 686; *City of St. Charles v. Stockey*, 154 Fed. 772, 85 C. C. A. 494.)

BUDGE, C. J.—This is an action brought by the respondent against the appellant, upon an oral contract, to recover a balance of \$387.68, alleged to be due respondent thereunder. There were several causes of action pleaded in the complaint but the only one at issue here is the first cause of action, involving the contract above mentioned, the other causes of action having been waived by the respondent.

It appears that respondent agreed to cut and haul a certain quantity of sawlogs for appellant "the amount of logs to be the amount of timber purchased by the said defendant from the United States Government," and to pile the brush. Appellant agreed to pay respondent therefor at the rate of three dollars per thousand feet, board measure. The case was tried before the court and a jury, the jury returned a verdict in favor of respondent for \$300, and judgment was entered thereon for respondent. This appeal is from the judgment and from the order of the trial court overruling appellant's motion for a new trial. There are several assign-

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ments of error which we do not deem necessary to set out in *haec verba*.

The point mainly relied upon by appellant is, that respondent having agreed to cut and haul all of the timber, and having pleaded a complete performance on his part, and the evidence, as appellant contends, failing to show a complete performance on the part of respondent, appellant was entitled to a directed verdict. It is admitted by appellant that respondent "would have coming to him, under said agreement, the amount claimed, to wit, the sum of \$387.68, if he had completed his agreement as alleged and agreed upon."

There is some conflict in the evidence as to just where the logs were to be hauled or delivered, and some conflict as to the number of logs which were not delivered. The evidence on the part of respondent is to the effect that all of the logs were properly delivered with the exception of three logs, aggregating a total of about 240 feet, board measure. All of the evidence shows that approximately 700,000 feet of logs were hauled and delivered by respondent under the contract. The evidence on the part of appellant is to the effect that some 15 or 18 logs were not delivered by respondent. The number of logs not delivered was a question for the jury to determine under all of the facts and circumstances in evidence. The jury were justified, under the evidence, in finding, as they must have done in order to have returned the verdict which they did return, a substantial compliance on the part of respondent.

This court held in *Huber v. Blackwell Lumber Co.*, 27 Ida. 373, 148 Pac. 903, that, "A party who has failed to perform his contract in full to deliver logs may recover compensation for the logs delivered according to the contract price, less damages occasioned by his failure to complete the contract." The questions involved in the case at bar are strictly analogous to those before the court in the Huber case, wherein the authorities are reviewed at length and the rule above quoted announced, quoting with approval from *Saunders v. Short*, 86 Fed. 225, 30 C. C. A. 462. It is unnecessary in this opin-

Points Decided.

ion to again review the authorities which support the principle announced in the Huber case. While the subject matter involved in the Huber case was the sale and delivery of personal property, and the subject matter of the contract here is that of employment for the performance of certain services, yet the principles involved are precisely the same. (*Turner v. Goodman*, 90 Ill. App. 339; *Buckwalter v. Bradley*, 31 Ky. Law Rep. 177, 104 S. W. 970.)

We have reached the conclusion, after a careful examination of the record and briefs of counsel, that there is no reversible error in the record, and the judgment is accordingly affirmed. Costs are awarded to respondent.

Morgan and Rice, JJ., concur.

(June 19, 1917.)

FRANKLIN PFIRMAN, Respondent, v. SUCCESS MINING COMPANY, LIMITED, a Corporation, and E. H. BECKER, C. M. CARROLL, P. J. GEARON and JAMES GEARON, Directors of Said Corporation, and L. C. WILSON, Director and Secretary of Said Corporation, Appellants.

[166 Pac. 216.]

MANDAMUS—CORPORATION—CORPORATION RECORDS—STOCKHOLDERS—INSPECTION OF CORPORATE RECORDS—TAKING COPIES OF CORPORATE RECORDS.

1. It is an imperative rule that before making an application for a writ of mandate, an express demand or request must be made on the defendant to perform the act sought to be enforced by the writ.

2. The facts of this case examined, and held sufficient to sustain the findings of the lower court to the effect that there was a demand and a refusal.

3. The refusal to permit a stockholder to appoint his own agent or attorney to examine the records of the corporation was in effect a denial of his right to examine such records.

Argument for Appellants.

4. At common law the right to inspect the corporate records by a stockholder was a right incident to ownership. This right, however, was limited to cases where an inspection was sought at proper times and in good faith for the purpose of protecting the interests of the corporation or his own interests as stockholder.

5. Under Rev. Codes, sections 2775, 2776 and 7122, the right of a stockholder to inspect and take copies of the records of a corporation is absolute.

6. The right to make copies of the records of a corporation follows as an incident to the right to examine and inspect the same.

[As to stockholder's right to inspect books of the corporation and remedies to enforce the right, see note in 107 Am. St. 607.]

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. William W. Woods, Judge.

Petition for writ of mandate. Peremptory writ issued. Defendants appeal. *Affirmed.*

J. E. Gyde, for Appellants.

Before a writ of mandate will issue commanding that certain acts be done, there must be a demand and a refusal. (*Price v. Riverside Land Co.*, 56 Cal. 431; *Wilson v. Board of Directors, etc.*, 138 Cal. 67, 70 Pac. 1059; *Oroville & V. R. R. Co. v. Supervisors of Plumas County*, 37 Cal. 354; *Moseley v. Collins*, 133 Ala. 326, 32 So. 131; *Lake Erie & W. R. Co. v. State*, 139 Ind. 158, 38 N. E. 596; 13 Ency. Pl. & Pr. 617.)

The demand must be made upon the proper officer. (13 Ency. Pl. & Pr. 618.)

At common law the right to inspect the books and records of a corporation existed, but that right could only be exercised in good faith and for some just, useful or reasonable purpose. The right was not enforced for speculative purposes or to gratify idle curiosity, where the interests of the stockholders and their protection were not involved. (7 R. C. L. 326, sec. 303; *Commonwealth v. Empire Pass Ry. Co.*, 134 Pa. 237, 19 Atl. 629; *Hemmingway v. Hemmingway*, 58 Conn. 443, 19 Atl. 766; *Lyon v. American Screw Co.*, 16 R. I. 472, 17 Atl. 61; *State v. Jessup & Moore Paper Co.*, 7 Penne. (Del.) 397, 72 Atl. 1057; *In re Devangoechea*, 86 N. J. L. 35, 91 Atl. 314.)

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James A. Wayne, for Respondent.

- The first refusal to permit an inspection of these records was made at the annual stockholders' meeting of April 3, 1916. No further notice or demand was necessary prior to the commencement of this action, for the reason that when one stockholder has reason to believe the demand will be refused, the necessity of such demand is obviated. (26 Cyc. 342.)

A denial of the right to inspect such books and records through the medium of agents is in effect a denial of the right of the stockholder himself to make such inspection. (*Mitchell v. Rubber Reclaiming Co.* (N. J. Eq.), 24 Atl. 407; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 78 Am. St. 707, 56 N. E. 1033, 48 L. R. A. 732.)

The right of a stockholder to make this inspection is not abridged or influenced in any manner by the motives which prompt the application to inspect, and no matter how improper the motives may be, and even though it be established that it is one of his purposes to use such information against the interests of the corporation, he still has the right to inspect. (*Johnson v. Langdon*, 135 Cal. 624, 87 Am. St. 156, 67 Pac. 1050; *Weinhenmayer v. Bitner*, 88 Md. 325, 42 Atl. 245; 10 Cyc. 956; *White v. Manter*, 109 Me. 408, 84 Atl. 890, 42 L. R. A. (N. S.) 332; *Kimball v. Dern*, 39 Utah, 181, Ann. Cas. 1913E, 166, 116 Pac. 28, 35 L. R. A. (N. S.) 134; *Poor v. Yarnell*, 28 Cal. App. 714, 153 Pac. 976.)

RICE, J.—This suit was brought in the District Court for Shoshone county by the respondent herein for the purpose of obtaining a writ of mandate against the appellants requiring them to permit an examination of the records of appellant corporation and to permit the respondent to make copies of the same. The court after filing its findings of fact and conclusions of law, ordered and decreed that a peremptory writ issue to the defendants requiring them to permit the plaintiff personally or through his agents, auditors, bookkeepers, accountants and attorneys to inspect, examine

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and take copies of the records, books and papers in the office of the Success Mining Company, of every kind and nature and description whatsoever, save and except reports of any engineers and maps prepared for the use of defendant corporation in certain pending litigation.

The respondent is the owner of 100 shares of the capital stock of the appellant corporation, and as such stockholder attended the annual meeting of the stockholders held on the 3d day of April, 1916. During the course of said meeting he made informal demand upon the officers of the appellant corporation of the privilege of examining and inspecting a certain ore contract between the appellant corporation and the Graeselli Chemical Company. He was informed by the secretary of the appellant corporation that neither the ore contract nor any other matter pertaining to the company's affairs would be given out except at the option of the officers of the company, and subsequently, upon the 18th day of April, 1916, he made a formal oral and written demand upon the secretary of the appellant corporation, demanding the right to examine and inspect all the records of the corporation. At this time the secretary of the appellant corporation invited the respondent to make a personal examination and inspection of all the records of the company at its office, but stated that the contract between appellant corporation and the Graeselli Chemical Company was at the mine office several miles away, and that he had no control over the same. Appellant's secretary was willing that the respondent make a personal examination, but declined to permit such examination to be made by an agent, unless such agent was acceptable to himself. The secretary also refused to permit a copy to be made of the list of stockholders. Upon the 19th day of April, 1916, this suit was filed.

It is without doubt the law that before a writ of mandate will issue commanding certain acts to be done, there must be a demand and a refusal. (*Price v. Riverside Land Co.*, 56 Cal. 431.) The appellants contend that in this case none of its officers ever refused to permit the respondent to examine the records in the office of the appellant corporation

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at Wallace, and that as to the contract with the Graesseli Chemical Company, respondent never demanded an examination of the same. The refusal to permit respondent to appoint his own attorney or agent to make the examination was in effect a denial of his right. (*Mitchell v. Rubber Reclaiming Co.* (N. J. Eq.), 24 Atl. 407.) There is no dispute but that the secretary of the appellant corporation absolutely refused to permit respondent to take copies of the records in the office of the company. Upon the entire proof offered at the trial the evidence of such demand and refusal is sufficient to sustain the findings of the lower court.

The error to which our attention is next directed is the action of the lower court in sustaining objections to the two following questions asked witness Howarth: First, "From your experience as a mining broker, what is your opinion as to the advisability, the taking into the—taking into consideration the interests of the stockholders of a corporation, to give out a list of stockholders?" And second, "What value is a list of stockholders?" The fifth and last error specified is that the court erred in entering judgment and decree in favor of the respondent.

These specifications of error involve the nature of the right of a stockholder to make examination and inspection, either personally or by his authorized agent or attorney, of the records of a corporation in which he holds stock and to make copies of the same. At common law, one of the privileges incident to the ownership of stock in a corporation is that of inspection of the books and records of the company. This privilege, however, was limited to cases where an inspection was sought at proper times and in good faith for the purpose of protecting the interests of the corporation and his own interests as a stockholder. (*Varney v. Baker*, 194 Mass. 239, 10 Ann. Cas. 989, 80 N. E. 524; *Venner v. Chicago City Ry. Co.*, 246 Ill. 170, 138 Am. St. 229, 20 Ann. Cas. 607, 92 N. E. 643; *White v. Manter*, 109 Me. 408, 84 Atl. 890, 42 L. R. A., N. S., 332.) This common-law rule has been adopted and extended by Rev. Codes, sections 2775 and 2776, which read as follows:

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“Sec. 2775: All corporations for profit are required to keep a record of all their business transactions; a journal of all meetings of their directors, members, or stockholders, with the time and place of holding the same, whether regular or special, and if special, their object, how authorized, and the notice thereof given. The record must embrace every act done or ordered to be done; who were present, and who absent, and, if requested by any director, member, or stockholder, the time must be noted when he entered the meeting or obtained leave of absence therefrom. On a similar request, the ayes and noes must be taken on any proposition, and a record thereof made. On similar request, the protest of any director, member or stockholder, to any action or proposed action, must be entered in full—all such records to be open to the inspection of any director, member, stockholder, or creditor of the corporation.”

“Sec. 2776: In addition to the records required to be kept by the preceding section, corporations for profit must keep a book, to be known as the “Stock and Transfer Book,” in which must be kept a record of all stock; the names of the stockholders or members, alphabetically arranged; instalments paid or unpaid; assessments levied and paid or unpaid; a statement of every alienation, sale or transfer of stock made, the date thereof, and by and to whom; and all such other records as the by-laws prescribe. Corporations for religious and benevolent purposes must provide in their by-laws for such records to be kept as may be necessary. Such stock and transfer book must be kept open to the inspection of any stockholder, member, or creditor.”

These sections must be read in connection with section 7122, Rev. Codes, which is as follows:

“Sec. 7122: Every officer or agent of any corporation, having or keeping an office within this state, who has in his custody or control any book, paper or document of such corporation, and who refuses to give to a stockholder or member of such corporation, lawfully demanding, during office hours, to inspect or take a copy of the same, or any part thereof,

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a reasonable opportunity so to do, is guilty of a misdemeanor.”

It is the decided weight of authority that such statutes have not only adopted the common-law rule, but have extended the same, and that the statutes make the right absolute. (*Johnson v. Langton*, 135 Cal. 624, 87 Am. St. 156, 67 Pac. 1050; *Weinhenmayer v. Bitner*, 88 Md. 325, 42 Atl. 245; *White v. Manter*, *supra*; *Kimball v. Dern*, 39 Utah, 181, Ann. Cas. 1913E, 166, 116 Pac. 28, 35 L. R. A., N. S., 134; *Venner v. Chicago City Ry. Co.*, *supra*; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 78 Am. St. 707, 56 N. E. 1033, 48 L. R. A. 732.)

The last specification of error is also directed at the right of respondent as stockholder to make copies of the corporation records. It has been held repeatedly that the right to make copies of the records of a corporation follows as an incident to the right to examine and inspect the same, and the rule rests upon the broad grounds that the business of a corporation is not the business only of the officers of the corporation, but is the business of the stockholders. In other words, that the directors are trustees, and that the property right, together with the right to examine and inspect the same, is in the stockholders. (*Cincinnati Volksblatt Co. v. Hoffmeister*, *supra*.) Under the statutes above quoted, the right to make copies of records cannot be denied.

The trial court did not err in the matters complained of, and the peremptory writ of mandate was properly issued. The judgment is affirmed. Costs awarded to respondent.

Budge, C. J., and Morgan, J., concur.

Argument for Appellants.

(June 21, 1917.)

WESLEY HUGHES and ANNA HUGHES, Husband and Wife, Respondents, v. THE LATOUR CREEK RAILROAD CO., a Corporation, et al., Appellants.

[166 Pac. 219.]

HOMESTEAD—ENCUMBRANCE OF—JOINDER OF HUSBAND AND WIFE—NECESSITY FOR.

Held, That under sec. 3106, Rev. Codes, providing that "No estate in the homestead of a married person, or in any part of the community property occupied as a residence by a married person can be conveyed or encumbered by act of the party, unless both husband and wife join in the execution of the instrument by which it is so conveyed or encumbered, and it be acknowledged by the wife as provided in Chapter 3 of this Title," an instrument purporting to convey or encumber such property or any interest therein, in which the wife does not join, is void.

[As to conveyance or encumbrance of homestead by one spouse only, see note in 95 Am. St. 909.]

APPEAL from the District Court of the Eighth Judicial District, for Kootenai County. Hon. Robert N. Dunn, Judge.

Action to quiet title to certain lands. Judgment on the pleadings of plaintiffs. *Affirmed*.

Edward H. Berg, for Appellants.

A husband has the absolute power to dispose of the common property of himself and wife to the extent and in the manner as he had of his separate property until a legal separation has been effected by a court of competent jurisdiction, and a division made under the direction of the court. (*Ray v. Ray*, 1 Ida. 566.)

A statute like ours of 1913 which required the wife to join in conveyance did not affect property acquired prior to the passage of the act, as the legislative act could not in any way affect the husband's right as it existed before the enactment. (*Reade v. De Lea*, 14 N. M. 442, 95 Pac. 131; *Spreckels v.*

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Spreckels, 116 Cal. 339, 58 Am. St. 170, 48 Pac. 228, 36 L. R. A. 497.)

It is admitted that the wife was more willing than the husband to make said transaction, and it is shown that she waited for more than a year and a half before disaffirming, and before commencing suit; that she lived upon the land and saw and knew of the improvements being made by the defendant railroad, which would enhance the value of the plaintiff's land. Under the subject of equitable estoppel, see *Konnerupt v. Frandsen*, 8 Wash. 551, 36 Pac. 493; *Grice v. Woolworth*, 10 Ida. 459, 109 Am. St. 214, 80 Pac. 912, 69 L. R. A. 584; *Engholm v. Ekrem*, 18 N. D. 185, 119 N. W. 35.

James H. Frazier, for Respondents.

The homestead occupied by the husband and wife as a residence is common property of the marital community, and the husband alone cannot convey or encumber it so long as it continues to be the residence of himself and wife. (*Law v. Spence*, 5 Ida. 244, 48 Pac. 282; *Mabie v. Whitaker*, 10 Wash. 656, 39 Pac. 172.)

"Where the purchaser knows that the land is community property, his contract made with the husband alone for its sale is void." (21 Cyc. 669c; *Warburton v. White*, 176 U. S. 484, 20 Sup. Ct. 404, 44 L. ed. 555; *Holyoke v. Jackson*, 3 Wash. Ter. 235, 3 Pac. 841; *Hill v. Young*, 7 Wash. 33, 34 Pac. 144.)

BUDGE, C. J.—This action was brought by respondents, husband and wife, to quiet title to certain lands in Kootenai county. The material facts alleged in the complaint are: That the land was occupied by respondents as their community homestead; that respondent, Wesley Hughes, without his wife's consent and without her joining in the execution of the instrument, delivered to the Latour Creek Railroad Company a deed to the timber on the homestead, receiving as consideration therefor certificates of stock in said company; that by an agreement of even date it was stipulated

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that this timber should be bonded by the railroad company in order to procure funds to be used in building and equipping its railroad; and that the agreement also provided for a right of redemption, which right was thereby assigned by the railroad company to the respondent, Wesley Hughes.

The Railroad Company answered that its rights had been transferred to J. F. Howarth Company, as trustee. The latter was made a party and answered that its rights had been transferred to one Jos. H. Whelan, as trustee. The latter by separate answer admitted the community character of the property, that it was occupied by respondents as a residence, and affirmatively alleged that respondent, Anna Hughes, at the time of making the deed was more interested and willing to make the same than her husband; that the bonds had been sold to the public under the representation that they were secured by this timber; and "that the persons holding said bonds . . . are relying upon said trust deed and upon the title vested in this defendant as such trustee under and by virtue of said deed."

The trial court rendered judgment upon the pleadings, quieting title to the land in respondents, as prayed in their complaint. This appeal is from the judgment.

The briefs of counsel devote much time and cite many authorities in an endeavor to reach a satisfactory interpretation of sec. 2686, Rev. Codes, as amended by c. 105, Sess. Laws 1913, p. 425. That section relates to community property in general. What effect the 1913 amendment may have had upon the authority of a husband to convey community property, which was in existence as such property prior to the enactment of the amendment, it is not necessary for us to determine under the facts in this case.

Sec. 3106, Rev. Codes, was in force at the time the deed in question was given. That section has not been amended nor repealed, and is as follows: "No estate in the homestead of a married person, or in any part of the community property occupied as a residence by a married person can be conveyed or encumbered by act of the party, unless both husband and wife join in the execution of the instrument by which it is

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so conveyed or encumbered, and it be acknowledged by the wife as provided in Chapter 3 of this Title.” The sole question then presented for our consideration is, can a husband, without the wife joining in the instrument, convey or in any manner encumber community property, occupied by them as a residence. This precise question does not seem to have been directly involved in any previous case in this jurisdiction, but many other states have similar statutes, which have been often considered. The result of the decisions is summarized in *Pipkin v. Williams*, 57 Ark. 242, 38 Am. St. 241, 21 S. W. 433, in these words: “The decided weight of authority is that such deeds are void absolutely, not relatively; that they are mere nullities, and leave the property as if they had not been made. [Citing many cases.]” (See, also, *Poole v. Gerrard*, 6 Cal. 71, 65 Am. Dec. 481, with extensive note; *Hart v. Church*, 126 Cal. 471, 77 Am. St. 195, 58 Pac. 910; *McGhee v. Wilson*, 111 Ala. 615, 56 Am. St. 72, 20 So. 619; *Freiermuth v. Steigleman*, 130 Cal. 392, 80 Am. St. 138, 62 Pac. 615; *Ainsworth v. Morrill*, 31 Cal. App. 509, 160 Pac. 1089.)

It follows that Wesley Hughes was without authority to give the deed in question and his purported deed, unaccompanied by the signature and acknowledgment of his wife, as required by the foregoing section, was void and operated to convey no interest whatever in or to the property therein described. Nor does the allegation in appellant’s answer that the respondent, Anna Hughes, was more willing to give the deed than her husband, constitute any defense or create an estoppel. Under the pleadings it is admitted that she did not join in the deed; failing in this, the entire transaction was a nullity.

The judgment is affirmed. Costs awarded to respondent.

Morgan and Rice, JJ., concur.

Points Decided.

(June 23, 1917.)

CHARLES HOLLAND, Appellant, v. THE AVONDALE
IRRIGATION DISTRICT, an Association, Respondent.

[166 Pac. 259.]

IRRIGATION DISTRICTS—ASSESSMENTS—SALE OF LANDS FOR DELINQUENT
ASSESSMENTS—PUBLIC OFFICER—RES ADJUDICATA—FINDINGS OF
FACT.

1. Where the steps taken by the officers of an irrigation district in levying assessments and spreading the same upon the assessment-roll, and matters connected therewith, are regular, upon failure to pay the assessment, the right of sale follows.

2. The treasurer of an irrigation district is under an affirmative statutory duty to accept nothing but "lawful money of the United States" in payment of assessments.

3. An agreement whereby a treasurer of an irrigation district is to accept a tender other than "lawful money of the United States," as provided by statute, is a legal nullity.

4. Where an assessment is duly levied by an irrigation district, and the same is unpaid and delinquent, it is the duty of the treasurer under the law to proceed to sell the land.

5. Where an irrigation district has been regularly organized and the benefits for the cost of the works apportioned to the land, such matters become *res adjudicata* and are not subject to collateral attack.

6. Special assessments are not provided for in secs. 2407 to 2409, Rev. Codes (amended, Laws 1911, p. 200), and are therefore to be levied and collected in conformity with the procedure for levying and collecting assessments for the payment of principal and interest of bonds, and the assessment is to be listed and carried out in the assessment-books in the same proportion as the assessment of benefits for the cost of the works.

7. A finding of the trial court based upon substantially conflicting evidence will not be disturbed.

[As to power of taxation and for what purposes it can be exercised, see note in 8 Am. St. 506.]

APPEAL from the District Court of the Eighth Judicial District, for Kootenai County. Hon. R. N. Dunn, Judge.

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Action to enjoin sale of property for failure to pay assessments. Judgment for defendant. *Affirmed.*

Robert D. Leeper, for Appellant.

The contract to furnish appellant's lands with water free from any charge for maintenance fees is valid and binding upon the respondent. (*Stowell v. Tucker*, 7 Ida. 312, 62 Pac. 1033; *Feeney v. Chester*, 7 Ida. 324, 63 Pac. 192; *Nampa & Meridian Irr. Dist. v. Briggs*, 27 Ida. 84, 147 Pac. 75; *Jackson v. Indian Creek Irr. Co.*, 16 Ida. 430, 437, 101 Pac. 814.)

The formation of the district by the stockholders of the old irrigation company simply amounts to a reorganization of the latter. Such reorganization could not affect the contract liabilities of the old company and the district is bound by them. (*Seymour v. Boise Ry. Co.*, 24 Ida. 7, 132 Pac. 427.)

"A corporation, whether public or private, that purchases water rights, ditches, and a canal system, must necessarily take them subject to all the duties and burdens of which it had notice existed against the grantor." (*Knowles v. New Sweden Irr. Dist.*, 16 Ida. 218, 101 Pac. 81.)

W. F. McNaughton and Edward H. Berg, for Respondent.

The plaintiff, or his predecessors in interest have had their day in court, and could not collaterally attack the proceedings had in the matter of the organization of the irrigation district confirmed by the district court. (*Knowles v. New Sweden Irr. Dist.* (on rehearing), 16 Ida. 235, 101 Pac. 87.)

RICE, J.—The Avondale Irrigation District, respondent herein, was organized in the year 1912 and embraced lands in Kootenai county, including thirty-two and one-half acres belonging to the appellant. Thereafter the respondent contracted to purchase the irrigation works belonging to the Avondale Irrigation Company, a private corporation, for the purpose of supplying water for the irrigation of land within its boundaries. Proceedings were duly had, apportioning the cost of the works equally to all the lands in the district, in-

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cluding the lands belonging to appellant. An election was held, authorizing the board of directors to levy an assessment, in lieu of issuing bonds, for an amount sufficient to pay the entire purchase price of the irrigation works. Included in said election was an authorization to the board of directors of the district to levy an assessment of \$2.50 per acre upon all the lands included in the district, to be used in maintaining the plant for the year 1913. Pursuant to the authority so granted, the said assessments were duly levied. The appellant failed to pay either of the assessments levied against his tract of land, and in due time the land was advertised for sale for such delinquent assessments according to law. Appellant brought this action for the purpose of enjoining respondent from selling said lands in accordance with the notice of sale.

Appellant contends that in consideration of a right of way for a pipe-line granted by his predecessor in interest, an oral agreement was made to the effect that water should be furnished for his said lands free of any annual maintenance charge; that respondent acquired its works subject to all the terms, conditions and provisions in any and all deed or deeds, contract or contracts and obligations therein or thereunder and existing by reason thereof or thereby.

It appears that the Avondale Irrigation Company, from whom the district acquired its works, agreed to and with the respondent as follows: "Now therefore the second party [respondent herein] has this day executed a promissory note for \$26,912.50 in favor of the first party [Avondale Irrigation Co.] and first party hereby accepts said note of the second party in full payment of said irrigation system and works, and sells and assigns to second party all of said plant and works and agrees with second party that it will accept in payment thereof orders by the stockholders for their distributive part thereof, to wit, orders from the stockholders to the amount of \$25.00 for each share of stock held by them, provided the said stockholders are not in arrears for maintenance charges and said orders are certified by the secretary of the Avondale Irrigation Co. to the effect that the said

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stockholder is not in arrears and if in arrears then for the amount of \$25.00 per share less said arrears.”

The right of an irrigation district to sell lands for delinquent assessments is conferred by statute. If the steps taken by the district authorities in levying the assessments and spreading the same upon the assessment-roll and matters connected therewith are regular, upon failure to pay the assessments the right to sell follows.

Counsel stipulated that the irrigation district was legally formed; that the special assessment of \$25.00 per acre was regularly made and confirmed by the district court, and that the assessment is now outstanding and unpaid. No assault is made upon the district for the inclusion of this land, and it was expressly understood that the land was never included in any other system prior to the formation of the district.

Appellant tendered to the proper officer of respondent irrigation district, twenty-five and one-half shares of stock of the Avondale Irrigation Company, in payment of the assessment against his land. The tender of this stock was refused, on the grounds that the stock certificates did not bear the indorsement of the secretary of the Avondale Irrigation Company, to the effect that the assessments on said stock were not in arrears. The assessment-roll is made up by the secretary of the district, and delivered by him to the treasurer of the district for collection. The treasurer is not only under no obligation to accept any payment other than cash, but is under an affirmative statutory duty to accept nothing but “lawful money of the United States,” in payment of these assessments. (Rev. Codes, sec. 2412; amended, Laws 1911, p. 414; amended, Laws 1911, p. 435; amended, Laws 1913, p. 542; amended, Laws 1915, p. 206.) He is a public officer and under the statute is required to give bond for the faithful performance of his duties. The assessment-roll under the law is placed in his hands for collection, and any agreement to accept anything but “lawful money of the United States,” as provided by statute, is a legal nullity. If the assessment was not paid it was his duty under the law to proceed to sell the land.

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The appellant has failed to show any reason why the sale should be enjoined.

Having stipulated as to the regularity of the organization of the district and apportionment of the benefits for the costs of the works to his lands, these matters become *res judicata* and are not subject to collateral attack. (*Knowles v. New Sweden Irrigation Dist.* (on rehearing), 16 Ida. 235, 101 Pac. 87; *Oregon Short Line v. Pioneer Irr. Dist.*, 16 Ida. 578, 603, 102 Pac. 904.)

Appellant further contends that he should not be required to pay the assessment of \$2.50 per acre levied for the maintenance of the works for the year 1913, for the reason that the works were acquired by respondent subject to appellant's right to have water supplied to his lands free of maintenance charges.

This levy appears to have been made as a special assessment, pursuant to sec. 2391, Rev. Codes. By sec. 2419, Rev. Codes (amended, Laws 1911, p. 201), it is provided that the procedure for levying and collecting assessments, where not provided for in secs. 2407 to 2409 (amended, Laws 1911, p. 200), shall conform to the provisions of the title relating to the payment of principal and interest of bonds. Special assessments are not provided for in secs. 2407 to 2409 and are therefore to be levied and collected in conformity to the procedure for levying and collecting assessments for the payment of principal and interest of bonds. In other words, the assessment is to be listed and carried out in the assessment-books in the same proportion as assessments of benefits for the cost of the works. The appellant therefore is in no better position to enjoin the sale of his lands for the maintenance assessment of \$2.50 an acre than for the costs of the works.

The appellant in his complaint also prays that the district be compelled to furnish water to his tract of land for irrigation and domestic purposes free and clear of any cost of annual assessment for furnishing the same.

Under the issues presented in this case, it cannot be said that the respondent may not be in a position to benefit the lands of appellant in the future, and that the said lands may

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not be subject to assessment for annual maintenance. (*Knowles v. New Sweden Irrigation Dist.*, *supra*; *Colburn v. Wilson*, 24 Ida. 94, 132 Pac. 579.) In addition to this consideration, the trial court found that the predecessors in interest of the respondent did not agree to furnish free water or any water for irrigation or domestic purposes for said lands or any part thereof. This finding being based upon substantially conflicting evidence, under the long line of decisions of this court, will not be disturbed.

The judgment of the district court is affirmed. Costs awarded to respondent.

Budge, C. J., and Morgan, J., concur.

(June 26, 1917.)

H. M. SNODERLY, Respondent, v. C. A. BOWER,
Appellant.

[166 Pac. 265.]

CONTRACTS—LATENT AMBIGUITY—MEETING OF THE MINDS—PLEADINGS.

1. Where it is provided in a contract that certain hay is to be measured according to the "government rule," and parol evidence is introduced to disclose the fact that there were several rules known as "government rule," and that the minds of the parties did not meet as to what government rule the provision in the contract referred to, such provision is void.

2. Where the pleadings are based upon an express provision in a contract fixing a rule of measurement, and nothing further, and it is shown conclusively from the evidence that there was no contract upon that point between the parties, the pleadings will not support the judgment.

[As to effect on contract for sale of chattel of failure to fix price, see note in *Ann. Cas.* 1912B, 359.]

APPEAL from the District Court of the Fourth Judicial District, for Twin Falls County. Hon. Chas. O. Stockslager, Judge.

Argument for Respondent.

Action on contract. Judgment for plaintiff. *Reversed.*

A. W. Ostrom, A. M. Bowen and W. P. Guthrie, for Appellant.

The contract in this case is on its face ambiguous and uncertain. It can become enforceable only by a showing what was meant by the term "government rule." If the contract could not be made plain in this regard, it was no agreement nor would an agreement exist unless the minds of the parties met. (9 Cyc. 248, and cases cited.)

The burden in this regard rests on the plaintiff and if he could not show a contract, certain in its terms, he could not recover, but could sue only for the reasonable value of his services. (9 Cyc. 757.)

If the contract is so uncertain and ambiguous that the court is unable to determine what was intended, the same is void and cannot be enforced. (*Ahlstrom v. Fitzpatrick*, 17 Mont. 295, 42 Pac. 757; *Omaha L. & T. Co. v. Goodman*, 62 Neb. 197, 86 N. W. 1082; *Reed v. Lowe*, 8 Utah, 39, 29 Pac. 740; *Barton v. Spinning*, 8 Wash. 458, 36 Pac. 439; 9 Cyc. 248, and cases cited.)

Longley & Walters, for Respondent.

Had the court in fact found such ambiguity or uncertainty in the contract as to render it unable to construe it without the aid of extrinsic evidence—and the record further showing a direct conflict between the parties to the contract as to the meaning of the words employed—then the appellate court is bound to presume that the questions of fact so presented were properly given the jury under correct instructions by the court, and the jury having by its verdict determined all questions of fact in favor of the plaintiff, in the absence of erroneous instructions, the appellate court must accept the verdict of the jury as conclusive upon all of the facts so presented. (Sec. 4824, Rev. Codes; *Coe v. McGran*, 23 Ida. 582, 131 Pac. 1110; *Davidson Grocery Co. v. Johnston*, 24 Ida. 336, Ann. Cas. 1915C, 1129, 133 Pac. 929; *Goodman v. Minear*

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Mining etc. Co., 1 Ida. 131; *State v. Preston*, 4 Ida. 215, 38 Pac. 694; *State v. Perry*, 4 Ida. 224, 38 Pac. 655.)

Where the ambiguity in the contract cannot be solved by reference to other parts of the contract and the surrounding circumstances are controverted, the court should charge the jury hypothetically as to the true interpretation of the contract. (*Carstens v. Earles*, 26 Wash. 676, 67 Pac. 404.)

It was the duty of the court to submit the question of what the intention of the parties was in the making of this contract to the jury, to be determined from the evidence offered by the respective parties. (*Ginnuth v. Blankenship & Blake Co.* (Tex. Civ. App.), 28 S. W. 828.)

The appellate court is bound to assume, in the present state of the record, that such question was properly submitted to the jury, and having been so submitted and passed upon by the jury, its verdict is conclusive upon this court.

RICE, J.—This is an action to recover balance alleged to be due on a written contract between the parties hereto, under which contract respondent undertook to farm appellant's land and to raise and stack the hay grown thereon. The controversy arose over the provision of the contract which attempted to define the method of measuring the hay. The material language of the contract in question is as follows:

“The hay to be measured within ten days after the last cutting is stacked and to be measured according to government rule with a basis of Five Hundred Twelve (512) cubic feet to the ton.”

The case was tried before the court and a jury and a verdict returned in favor of respondent in the sum of \$500, and judgment was entered on the verdict for that amount, from which this appeal is prosecuted.

In II Eng. Ruling Cases, p. 718, the rule is stated as follows: “Where a determinate intention appears to be expressed by the written instrument, extrinsic evidence is admissible to show that the description of an object contained in the instrument is applicable with legal certainty to either of two objects; and, a latent ambiguity having been thus

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disclosed, evidence of the surrounding circumstances is admissible to show which of the objects was meant by the description";

It will be seen from this rule that the process in explaining latent ambiguity is divided into two parts: First, the introduction of extrinsic evidence to show that the latent ambiguity actually existed, and second, the introduction of extrinsic evidence to explain what was intended by the ambiguous statement.

It seems to be conceded by the parties that the term "government rule," as it appears in this contract, is a latent ambiguity. The appellant in this case in order to point out what was in the minds of the parties at the time the term "government rule" was put into the contract, introduced evidence to show that at that time he produced a rule known as a government rule and showed it to the respondent. This the respondent absolutely denied. The verdict of the jury could have been reached only on the basis that it found with respondent on this point. The appellant introduced further evidence to show that in that vicinity there were several rules known as the "government rule" for measuring hay. The respondent made no attempt to clear up the ambiguity by extrinsic evidence, but introduced a rule for measuring hay which he obtained from the department of agriculture. He admits that he had no definite rule in mind at the time he entered into the contract, but supposed that the government had some rule by which he would be willing to measure the hay. Counsel for respondent in addressing the court said: "I am not attempting to prove that this is the government rule except as the document itself makes the statement." The document itself does not purport to be an official government rule, but one compiled and recommended by the department of agriculture. Respondent admits, however, that this rule was not in his mind as the government rule at the time he entered into the contract, he never having seen or heard of the rule until after that time. The document itself further shows that it was not printed until some time after the contract had been executed.

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It will be seen then that the latent ambiguity in the contract has been exposed, but the evidence does not explain, or even attempt to explain, what was in the minds of the parties at the time the term "government rule" was inserted in the contract. It is not for the court or jury to make a contract for the parties, but only to determine what the parties intended the ambiguous terms to mean at the time they entered into the agreement.

From the evidence in this case, it is clear that there was no meeting of the minds of the parties on the question as to what constituted the "government rule" when the contract was entered into, and that provision in the contract would therefore be void. (*Raffles v. Wichelhaus*, 3 Hurl. & C. 906, 159 Eng. Reprint, 375; *Stong v. Lane*, 66 Minn. 94, 68 N. W. 765.)

The respondent seems to have realized the weakness of his position in declaring upon the express contract, and tried the case upon the theory that the plaintiff was entitled to a specific amount per ton by weight, rather than by the specified rule. The evidence has been carefully examined to determine whether or not the appellant joined in and tried his case upon the same theory. It has been found that he did not, but on the contrary resisted the introduction of evidence by the respondent in his effort to prove the correctness of the rule of measurement used by respondent in attempting to establish the actual number of tons of hay stacked by him. Counsel for respondent asked the following question: "And what would you say about this method being a correct fair method of measuring?" To which counsel for the appellant objected as follows: "We object to that unless it is further shown that he has tested it, and for the additional reason it would be immaterial unless it is shown that this was the measurement which was in contemplation of the parties to the contract at the time it was made."

As the appellant did not join in and try his case upon the same theory as respondent, but kept within the issues made by the pleadings, he did not waive the right to have the judgment supported by the pleadings. As the pleadings were based upon the express provision in the contract fixing the

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rule of measurement, and nothing further, and it is shown conclusively from the evidence that there was no contract upon that point between the parties, the pleadings will not support the judgment.

Upon a retrial of this case the district court should permit plaintiff to amend his complaint, if he desires, so as to set out the reasonable value of the services rendered. Upon that issue the proof would not be confined to the actual number of tons stacked, to be ascertained by weight or any rule of measurement. Any competent evidence tending to show reasonable value of the services rendered would be admissible.

The judgment is reversed and a new trial ordered. Costs awarded to appellant.

Morgan, J., concurs.

BUDGE, C. J., Dissenting.—I am unable to concur in the conclusion reached by my associates.

It is conceded that the words "according to government rule" are ambiguous. It is expressly urged by appellant that "—at least the law ought to imply—the common and universal meaning of such term, in the locality where the contract was made." He insists not only that the particular rule urged by him was the "government rule" the contracting parties had in mind, but further, since as he claims, it was the rule commonly and generally known as the government rule, that alone would govern and determine the intention of the parties. But there were, as appears from the uncontradicted evidence, several rules for measuring hay in use in that vicinity, each known as a "government rule." It therefore became a question of fact for the jury, under proper instructions, to determine what meaning should be given thereto, and which of the several rules in evidence the parties should be deemed to have intended. (*Carstens v. Earles*, 26 Wash. 676, 67 Pac. 404-408; *Ginnuth v. Blankenship & Blake Co.* (Tex. Civ. App.), 28 S. W. 828; Page on Contracts, sec. 1129; Elliott on Contracts, secs. 1564-1566.)

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Nor does the fact that respondent testified that he had no definite rule in mind at the time the contract was entered into, alter the rule. The jury were not bound by this testimony. The admissions or declarations of the parties as to what was intended are not controlling. Under all the facts and circumstances in evidence, and in view of the fact that the contract had been pleaded and admitted, it was proper for the court to submit the meaning to be given the words "government rule" to the jury. (*Bullock v. Finley*, 28 Fed. 514.)

But in any event it nowhere appears that the appellant was misled by the proof, and the evidence is amply sufficient to sustain the verdict. Section 4824, Rev. Codes, provides, that where there is substantial evidence to support the verdict it must not be set aside. (*Herculith Co., Ltd., v. Gustafson*, 22 Ida. 537, 126 Pac. 1050; *Coe v. McGraw*, 23 Ida. 582, 131 Pac. 1110; *Denbeigh v. Oregon-Washington R. etc. Co.*, 23 Ida. 663, 132 Pac. 112; *Meeker v. Trappett*, 24 Ida. 198, 133 Pac. 117; *Davidson Grocery Co. v. Johnston*, 24 Ida. 336, Ann. Cas. 1915C, 1129, 133 Pac. 929; *Casaday v. Stuart*, 29 Ida. 714, 161 Pac. 1026; *Huffaker v. Edgington*, ante, p. 178, 163 Pac. 793.) Section 4225, Rev. Codes, provides that: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that the party has been so misled, the court may order the pleading to be amended, upon such terms as may be just." Section 4226, Rev. Codes, provides that: "Where the variance is not material, as provided in the last section, the court may direct the facts to be found according to the evidence, or may order an immediate amendment, without costs." In *Clopton v. Meeves*, 24 Ida. 293-298, 133 Pac. 907, this court, applying the above sections, said: "Under the liberal rule adopted by our statute, we think the court might properly find according to the facts and that this variance would not be fatal. If the trial judge had thought it necessary, he might have ordered an immediate amendment to support the evidence and finding." (See, also, *Western Loan etc. Co. v. Kendrick*

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State Bank, 13 Ida. 331, 90 Pac. 112.) The trial court then had ample authority to direct the jury to find the facts according to the evidence without requiring the pleadings to be amended. Since the instructions of the court are not in the record we must presume that the court correctly instructed the jury on all of the material issues involved, and that the instructions taken as a whole fairly submitted the case to the jury. (*Hopkins v. Utah Northern Ry. Co.*, 2 Ida. (277) 300, 13 Pac. 343; *Gumaer v. White Pine Lumber Co.*, 11 Ida. 591, 83 Pac. 771; *McLeod v. Rogers*, 28 Ida. 412, 154 Pac. 970.)

Under our code system the rule applicable to the case at bar, is as follows: "It has been held that under a pleading alleging an express contract, a recovery on an implied contract may be sustained, where the defendant's rights have been fully protected. At most it is but a variance between the pleadings and the proof which may be disregarded unless it appears that the defendant was misled by it." (9 Cyc. 749; *Clapp v. Schaus*, 156 App. Div. 681, 141 N. Y. Supp. 451; *Lufkin v. Harvey*, 125 Minn. 458, 147 N. W. 444; *Anderson v. Akins' Estate*, 99 Neb. 630, 157 N. W. 334; *Burgess v. Helm*, 24 Nev. 242, 51 Pac. 1025; *Nyhart v. Pennington*, 20 Mont. 158, 50 Pac. 413; *Palmer v. Miller*, 19 Ind. App. 624, 49 N. E. 975; *Buckingham v. Harris*, 10 Colo. 455, 15 Pac. 817, following the case of *Sussdorff v. Schmidt*, 55 N. Y. 319; *Wells v. Crawford*, 23 Colo. App. 103, 127 Pac. 914; *Chicago R. I. & P. Ry. Co. v. Bankers' Nat. Bank*, 32 Okl. 290, 122 Pac. 499.) These cases were decided under statutes practically identical with our own, in the respects above referred to. It is clear from the whole record, in my opinion, that substantial justice has been done, and that the judgment should be affirmed.

A new trial should not be granted, as no other or different means can be adopted, than was followed at the trial for determining the amount of hay that the respondent stacked—this was the real question submitted to the jury, and I think fairly so. Should the complaint be amended so as to state a cause of action upon a *quantum meruit* basis, the proof

Points Decided.

that could be properly offered would be practically the same as appears in the present record. In other words, I do not think, under the sections of the statute above cited, the authorities referred to, and under the facts of this case, that a technical rule of pleading should be invoked when it is clear that the rights of the litigants have been fairly adjudicated.

(June 26, 1917.)

P. C. ROSS, Respondent, v. GEORGE KERR, Appellant.

[167 Pac. 654.]

MALICIOUS PROSECUTION — PROBABLE CAUSE — ADVICE OF COUNSEL — MALICE — COMPENSATORY AND PUNITIVE DAMAGES — TERMINATION OF PROSECUTION IN FAVOR OF ACCUSED.

1. To entitle a party to recover damages by reason of malicious prosecution, it must appear that the person who preferred the criminal charge acted without probable cause to believe the accused guilty of the crime charged, that he acted with malice and that the criminal action was terminated in favor of accused.

2. The existence of facts showing probable cause is for the jury to determine; whether or not the facts, found by the jury to exist, constitute probable cause is a question for the court.

3. To justify by advice of counsel defendant must show that he truly, correctly, fully, fairly and in good faith stated to such counsel all the facts within his knowledge, or which he might, with reasonable diligence, have ascertained, bearing upon the guilt or innocence of the accused.

4. Malice must be shown to have existed before a recovery may be had by reason of a malicious prosecution, but malice, as a fact, may be inferred by the jury from the absence of probable cause. In order to recover punitive damages, however, actual malice in preferring the charge must be shown to have existed. This is done by showing that the person who preferred the charge was actuated by ill will or a desire to injure the accused.

5. The fact that the testimony taken at the preliminary examination was not written by a reporter does not render the proceeding

Argument for Appellant.

void or the order discharging the accused of no avail as a determination in his favor of the criminal action.

[As to what is necessary to support an action for malicious prosecution, see notes in 12 *Am. Dec.* 215; 26 *Am. St.* 127.]

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Chas. P. McCarthy, Judge.

Action for malicious prosecution. Judgment for plaintiff.
Affirmed.

J. L. Niday, for Appellant

In actions of malicious prosecution the plaintiff must, in order to recover, establish not only malice, but want of probable cause. Those two elements are essential, and they must concur or the action will not lie. (*Potter v. Seale*, 8 Cal. 217, 220; *Anderson v. Coleman*, 53 Cal. 188; *Grant v. Moore*, 29 Cal. 644; *Smith v. Liverpool etc. Ins. Co.*, 107 Cal. 432, 40 Pac. 540.)

The action of malicious prosecution is not favored in law, and hence has been hedged about by limitations more stringent than in the case of almost any other act causing damage to another. (*Russell v. Chamberlin*, 12 Ida. 299, 303, 9 Ann. Cas. 1173, 85 Pac. 926; *Ball v. Rawles*, 93 Cal. 222, 27 Am. St. 174, 28 Pac. 937; *Gee v. Culver*, 12 Or. 228, 6 Pac. 775; *Burt v. Smith*, 181 N. Y. 1, 73 N. E. 495, 2 Ann. Cas. 576, and cases cited.)

If the defendant acted in good faith on evidence, whether true or false, which is sufficient to create a reasonable belief that the accused is guilty of the offense, he is protected. (*Anderson v. Friend*, 85 Ill. 135.)

When a person acting in good faith and under advice of counsel, is led to institute a criminal prosecution against another, and thereafter the prosecution fails, the prosecutor does not thereby render himself liable to an action for malicious prosecution or any other action. (*Central Light & Fuel Co. v. Tyron*, 42 Okl. 86, 140 Pac. 1152; *Le Clear v. Perkins*, 103 Mich. 131, 61 N. W. 357, 26 L. R. A. 627; *Cooper v.*

Argument for Respondent.

Fleming, 114 Tenn. 40, 84 S. W. 801, 68 L. R. A. 849; *Elreno Gas & Electric Co. v. Spurgeon*, 30 Okl. 88, 118 Pac. 397.)

It is not necessary that every fact should be disclosed to the attorney in order to be protected under his advice. (*Young v. Jackson* (Tex. Civ. App.), 29 S. W. 1111; *Harris v. Woodford*, 98 Mich. 147, 57 N. W. 96; *Baldwin v. Weed*, 17 Wend. (N. Y.) 224.)

It is a good defense to an action for malicious prosecution, that the defendant, before commencing the prosecution, presented the matter to the county attorney, fairly stating to him all the facts, and then in good faith followed his advice. (*Schippel v. Norton*, 38 Kan. 567, 16 Pac. 804.)

The government cannot allow the citizen to suffer for his trust in its proper functionaries. (*Laughlin v. Clawson*, 27 Pa. St. 328, 330.)

Express or positive malice must be shown, as well as the absence of probable cause. (*Long v. Rodgers*, 19 Ala. 321.)

Malice is a fact to be proved and not an inference of law. (*Gee v. Culver*, 12 Or. 228, 6 Pac. 775.)

A *nolle prosequi* entered by the procurement of the party prosecuted or by his consent, or by way of compromise, is not such a determination of the prosecution alleged to have been malicious as will enable the party prosecuted to maintain the action. (*Langford v. Boston etc. R. Co.*, 144 Mass. 431, 11 N. E. 697; *Woodman v. Prescott*, 66 N. H. 375, 22 Atl. 456.)

"The existence of probable cause for a prosecution is always a matter of law to be determined by the court." (*Ball v. Rawles*, 93 Cal. 222, 27 Am. St. 174, 28 Pac. 937, 26 Cyc. 106.)

The court erred in submitting to the jury the question of compensatory or punitive damages. (*Stilson v. Gibbs*, 53 Mich. 280, 284, 18 N. W. 815; *Wilson v. Bowen*, 64 Mich. 133, 31 N. W. 81.)

Perky & Brinck, for Respondent.

Under the contract between the parties, respondent was merely the debtor of appellant. Had he collected all of his

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accounts and appropriated the whole amount he could not have been guilty of embezzlement. (*State v. Covert*, 14 Wash. 652, 45 Pac. 304; *Dixie Fire Ins. Co. v. Nelson*, 128 Tenn. 70, 157 S. W. 416; note in 87 Am. St. 37, 38.)

There could therefore have been no probable cause for the prosecution. Probable cause may be founded upon misinformation as to facts, but not as to law. (*Hazzard v. Flury*, 120 N. Y. 223, 24 N. E. 194; *Whitney v. New York Cas. Ins. Assn.*, 27 App. Div. 320, 50 N. Y. Supp. 227; *Hall v. Hawkins*, 5 Humph. (24 Tenn.) 357; *Parli v. Reed*, 30 Kan. 534, 2 Pac. 635.)

A criminal prosecution upon any other motive than that of bringing a guilty party to justice, is malicious. (*Krug v. Ward*, 77 Ill. 603; *Kendrick v. Cypert*, 10 Humph. (29 Tenn.) 291; *Gabel v. Weisensee*, 49 Tex. 131; *Vinal v. Core*, 18 W. Va. 1; 19 Am. & Eng. Ency. of Law, 2d ed., 675.)

If there was any conflict in the evidence as to whether there was a compromise between the parties, it was properly a question for the jury and properly submitted to them, whether the dismissal was brought about by the settlement. (L. R. A. 1915A, 604; *Marcus v. Bernstein*, 117 N. C. 31, 23 S. E. 38.)

The court did not submit the question of probable cause to the jury to determine, but submitted special interrogatories as to disputed facts, from their answers to which he could make his findings as to probable cause. Where there is any conflict in the facts this is the proper procedure. (*Burton v. St. Paul etc. Ry. Co.*, 33 Minn. 189, 22 N. W. 300; 26 Cyc. 107-109, and cases cited.)

The jury may in a proper case assess punitive damages. (26 Cyc. 64, 65, 117; 4 Sutherland, Damages, 3d ed., 3579, and n. 2.)

MORGAN, J.—From December 2, 1912, to May 10, 1913, the respondent, Ross, was employed by the American Laundry Company of which appellant, Kerr, was part owner and president. His duties were those of a driver of one of the delivery wagons of the company and to solicit patronage and

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deliver the articles when laundered. On or about May 29, 1913, he was arrested upon a charge of embezzlement preferred against him by appellant, who accused him of misappropriating moneys collected from the patrons of the laundry. Respondent thereupon gave bond and on July 9, 1913, was discharged, by order of the justice of the peace before whom the preliminary proceedings were had, and the charge against him was dismissed. Thereafter he instituted this action against appellant for malicious prosecution. The jury rendered a verdict in his favor in the sum of \$2,000, \$1,500 of which was allowed as compensatory damages and \$500 as punitive damages, and judgment was entered for these amounts. Appellant moved for a new trial, which motion was denied. This appeal is from the judgment and from the order denying the motion for a new trial.

It is contended by appellant that the evidence disclosed probable cause for believing the respondent guilty of embezzlement. There is a direct conflict in the testimony concerning the terms of the contract of employment between respondent and the Laundry Company. The terms of this agreement are a very material factor in determining the question of probable cause.

Appellant, and other witnesses in his behalf, testified that under the terms of this contract Ross was to collect the money due from the patrons of the laundry, and account for the same each week and that he was to receive, as his compensation, fifteen per cent of the money collected, it being understood, however, that the commissions on the returns of the first week were to be paid to a party by the name of Smith, who was respondent's predecessor and who accompanied him during that time in order to familiarize him with his duties. On the other hand, respondent testified that by the agreement of employment he was to be charged by the company for all the laundry he procured, whether or not the charge therefor was collected by him, and he was to reimburse himself by making the collections; that he was to receive fifteen per cent, based not upon the amount of money collected, but upon the

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amount of business procured; that it was not the understanding that the first week's commissions should go to Smith.

Respondent's testimony is corroborated, to some extent, by recitals contained in a certain agreement entered into on June 9, 1913, after the arrest, which agreement was in the nature of a settlement of the account between respondent and the company. The recitals referred to are as follows: "That whereas, second party has been from December 2, 1912, to May 10, 1913, inclusive, collecting and delivering laundry for first party under a contract with first party whereby all bills for laundry brought in by second party from customers were charged directly by first party to second party, second party being responsible for the payment thereof in full, regardless of whether he collected the amount thereof from the customers or not, second party to receive and be entitled to withhold fifteen per cent commission on the amount of all moneys so charged to him; . . . "

It is true appellant testified that when he signed this agreement for the company he did not carefully read it, or know that it contained the clause above referred to, however, there was testimony that the agreement was read aloud to him and that he did carefully read it.

Special interrogatories were submitted to the jury upon the question of the terms of the contract of employment and it found them to be as testified to by respondent.

An appellate court will not disturb the verdict of the jury or the judgment of a trial court because of conflict in the evidence when there is sufficient proof, if uncontradicted, to sustain it. (*Jensen v. Bumgarner*, 28 Ida. 706, 156 Pac. 114; *State v. Steen*, 29 Ida. 337, 158 Pac. 499; *Casady v. Stuart*, 29 Ida. 714, 161 Pac. 1026; *Sweeten v. Ezell*, ante, p. 154, 163 Pac. 612.)

The record discloses that appellant consulted the prosecuting attorney of Ada county before preferring the charge against respondent, and upon his advice swore to the complaint charging embezzlement, but the jury found, in response to a special interrogatory submitted to it, that appellant did not relate to the prosecuting attorney all the material facts

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within his knowledge bearing upon the terms of employment, in that he failed to state that the relation of debtor and creditor existed between the American Laundry Company and respondent. It is evident that appellant did not state facts from which such relation should have been inferred, because he contends that such facts did not exist. To justify by advice of counsel defendant must show that he truly and correctly, fully and fairly, and in good faith stated to such counsel all of the facts within his knowledge, or which he might, with reasonable diligence, have ascertained, bearing upon the guilt or innocence of the accused. "The making of an exaggerated, misrepresented, incorrect statement, or the withholding of any material fact, is inconsistent with probable cause." (26 Cyc. 34.)

Appellant urges that the evidence was insufficient to show malice on his part in preferring the charge against respondent. Malice is an essential ingredient of malicious prosecution, but may, as a fact, be inferred from the absence of probable cause. (26 Cyc. 23.)

The jury, however, awarded respondent punitive damages under an instruction from the court that it might do so should it find that actual malice existed. The record discloses that after respondent left the employ of the Laundry Company he secured a position with a rival concern and that appellant believed he was enticing its customers and inducing them to patronize the rival laundry. There was evidence of threats made by appellant that he would prevent respondent from holding a position or obtaining any employment. Appellant admitted that he caused to be inserted in the newspapers of Boise, after the charge against respondent had been dismissed, an article to the effect that he had abandoned the prosecution out of sympathy with the family of respondent. This evidence is amply sufficient to establish the existence of actual malice.

It is contended that there was not such a termination of the criminal case as would justify the action for malicious prosecution. It appears that the attorney who represented respondent in the criminal action inquired of the prosecuting

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attorney whether or not the proceeding could be dismissed and that a continuance of the preliminary hearing was had, from time to time, by consent of all the parties. After the settlement of the account between Ross and the Laundry Company, on June 9th, the deputy prosecuting attorney made a motion to dismiss the case, which was opposed by respondent for the reason that no grounds were set forth in the motion which would vindicate him. The justice's docket, which is in evidence, shows that on July 9, 1913, the time finally set for the preliminary hearing, the examination of respondent came on duly to be heard upon notice to the prosecuting attorney and the prosecuting witness; that the sworn testimony of appellant was taken and thereupon respondent's counsel moved to dismiss the case for the reason that it appeared from the evidence that he had not committed the crime charged against him; that the magistrate sustained the motion and dismissed the charge. Respondent introduced testimony to show that this dismissal was not procured in consideration of the settlement of the account between him and the company. The deputy prosecuting attorney testified that he contemplated the settlement of this account in his motion to dismiss the criminal charge only so far as he deemed it nearly impossible to obtain a conviction upon the charge of embezzlement where it would be shown that the sum of money claimed to have been embezzled was repaid. It is conceded that the evidence, at the preliminary hearing, was given orally and was not reported. This fact, however, cannot be taken advantage of by appellant. There is no doubt that the preliminary hearing and dismissal of the charge divested the examining magistrate of jurisdiction to further consider the case. This being true there was such a final termination of the criminal case as to form the basis for this action.

Appellant contends that the court erred in submitting to the jury an instruction directing it to determine the terms of the employment between Ross and the company. The existence of facts bearing on the question of probable cause is to be decided by the jury, then it is the duty of the court to say

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whether or not, from the facts found by the jury to exist, there was probable cause. Whether or not respondent was charged with the money due from the patrons, and was to pay the company irrespective of whether he made the collections, in short, whether or not such facts existed as would make the relation between him and the company that of debtor and creditor, were disputed questions of fact and were correctly submitted to the jury. The jury having found for respondent on these issues it was for the court to say that there was a want of probable cause, which it did in its judgment upon the verdict.

The court submitted to the jury the question of exemplary or punitive damages. By almost unanimous authority this is proper where malice is actual. There is sufficient evidence in this case to support the finding of actual malice. Appellant requested the instruction: "That actual malice must be proved by plaintiff." The court properly refused this instruction on the ground that actual malice was necessary only so far as the party injured was entitled to punitive damages. The court submitted the question of actual malice properly, and defined it correctly when it said that if the jury found that appellant was actuated by ill will toward respondent, or by desire to injure him, then punitive damages could be recovered. (1 Words and Phrases, 158.)

Appellant contends that the court erred in not permitting him to answer a question as to whether or not he was actuated by malice in making the criminal charge. The question called for a conclusion of law and the objection to it was properly sustained. (*Gimbel v. Gomprecht* (Tex. Civ. App.), 36 S. W. 781; 7 Ency. Ev. 600; *Gabel v. Weisensee*, 49 Tex. 131.) Moreover, he was permitted to testify as to his motives in making the charge.

There are numerous assignments of error set forth by appellant but not discussed in his brief. We have examined them fully and are convinced that they are not well taken. A discussion of them in this opinion, however, can be properly omitted.

Argument for Appellant.

The judgment and order appealed from are affirmed.
Costs are awarded to respondent.

Budge, C. J., and Rice, J., concur.

Petition for rehearing denied.

(June 26, 1917.)

THE BLUMAUER-FRANK DRUG CO., a Corporation,
Appellant, v. THOMAS YOUNG, Respondent.

[167 Pac. 21.]

STATUTE OF FRAUDS—AGREEMENT FOR SALE OF GOODS—SUFFICIENCY OF
MEMORANDUM.

In order to render an oral contract falling within the scope of the statute of frauds enforceable by action, the memorandum thereof must state the contract with such certainty that its essentials can be known from the memorandum itself, or by a reference contained in it to some other writing, without recourse to parol proof to supply them.

[As to proof by parol of contracts of lost memorandum required by statute of frauds, see note in *Ann. Cas.* 1916E, 173.]

APPEAL from the District Court of the Eighth Judicial District, for Kootenai County. Hon. R. N. Dunn, Judge.

Action for damages and for goods sold and delivered.
Judgment for defendant. *Affirmed.*

James H. Frazier, for Appellant.

The letters clearly form a part of the contract, and being signed by the defendant, not only ratify the contract but complete it and make it a written memorandum under the statutes of frauds. (20 Cyc. 278.)

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If the buyer accepts a part of the goods under an oral agreement, such acceptance makes the entire contract valid. (*Gabriel v. Kildare Elevator Co.*, 18 Okl. 318, 11 Ann. Cas. 517, 90 Pac. 10, 10 L. R. A., N. S., 638; *Coffin v. Bradbury*, 3 Ida. 770, 95 Am. St. 37, 35 Pac. 715, 20 Cyc. 247; *Herman Bros. Co. v. Wacker*, 96 Neb. 102, 147 N. W. 127.)

"Where it was the intention of the parties that the goods be shipped C. O. D. there was a delivery by the seller where the goods were placed in the hands of the carrier for consignment to the buyer." (*Golightly v. State*, 49 Tex. Crim. 44, 122 Am. St. 779, 13 Ann. Cas. 827, 90 S. W. 26, 2 L. R. A., N. S., 383; *Keller v. State* (Tex. Crim.), 87 S. W. 669, 1 L. R. A., N. S., 489; *Jones v. United States*, 170 Fed. 1, 95 C. C. A. 213, 24 L. R. A., N. S., 143; *Hamilton v. Joseph Schlitz Brewing Co.*, 129 Iowa, 172, 105 N. W. 438, 2 L. R. A., N. S., 1078.)

Edward H. Berg, for Respondent.

The memorandum required by the statute of frauds does not have to be contained in a single paper, and letters or a series of letters all showing that they relate to the subject matter, may be taken into consideration, but the law is well settled that all such letters or other writings must show without the use of parol evidence the alleged contract. (*Coffin v. Bradbury*, 3 Ida. 770, 95 Am. St. 37, 35 Pac. 715.) California has held under a similar statute, that an oral contract of sale where no part of the purchase price is paid, is invalid unless the buyer accept and receive part of the things sold, and that even a delivery of the goods without acceptance by the purchaser, does not take it out of the operation of the statute. (*Jamison v. Simon*, 68 Cal. 17, 8 Pac. 502.)

Our supreme court has clearly pointed out the difference between a sale and agreement to sell. In the case at bar there was neither a sale nor a conditional sale. (*Idaho Implement Co. v. Lambach*, 16 Ida. 497, 101 Pac. 951.)

MORGAN, J.—This action was commenced by appellant to recover judgment against respondent in the sum of \$279.34. In the complaint two causes of action are stated, in the first

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of which it is alleged that an oral agreement was entered into between the parties whereby appellant was to sell, and respondent was to purchase, certain goods at the agreed price of \$279.34; that pursuant to the agreement it shipped the goods to him at Coeur d'Alene, but that he refused and neglected to receive them from the railroad company, and that while they were still in the depot they were destroyed by fire. In the second cause of action is alleged the oral agreement, above mentioned, the delivery of the goods to respondent and his refusal to pay for them.

Upon the trial appellant offered to prove the oral agreement and offered in evidence an unsigned memorandum purporting to be an order for the goods given by respondent to its traveling salesman. It asked permission to amend its complaint by adding thereto an allegation to the effect that after the oral agreement to purchase the goods was entered into it was ratified by respondent in writing. The following letters, from respondent to appellant, being the ratification relied upon, were offered in evidence:

"January 31, 1914.

"Blumauer-Frank Drug Co.,

"Portland, Oregon.

"Gentlemen: Mr. Dudley called me up today and told me to write you and tell why I had not taken up the order at the depot. I have not taken it up because I had not the money to do so. I hardly know why the bill amounts to so much. Will you please send me a duplicate invoice so I can look it over. . . .

"(Signed) THOS. YOUNG."

"April 2, 1914.

"Blumauer-Frank Drug Co.,

"Portland, Ore.

"Gentlemen: Please send me a bill of my account to date. I do not care to make a property statement at present as in a very short time I can give a much better report than at the present time.

"In regard to the order here at the depot, I think you ought to release it and give me about thirty days in which to pay

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for it. However, I want permission to return the razors and stationery to you.

“Yours very truly,
“(Signed) THOS. YOUNG.”

The request to amend the complaint was refused and objection to the introduction of the above-mentioned documentary evidence was sustained by the court. At the close of appellant's testimony respondent moved for a judgment of nonsuit, which was granted. This appeal is from the judgment and the rulings above mentioned are assigned as error.

It appears that these goods were shipped by appellant from Portland, Oregon, to Coeur d'Alene consigned to itself; that the bill of lading was attached to a draft drawn upon respondent for the purchase price and was forwarded to a bank in Coeur d'Alene with directions to deliver the bill of lading upon payment of the draft; that the draft was never paid and the goods were never delivered, but were destroyed by fire, as alleged in the complaint. It does not appear that it was the intention of the parties that the sale should be consummated until such time as the purchase price was paid, and the contention of appellant that delivery was complete when the merchandise was placed in the hands of the carrier is not sustained by the evidence. (*Booth v. A. Levy & J. Zentner Co.*, 21 Cal. App. 427, 131 Pac. 1062.)

Sec. 6009, Rev. Codes, a part of the statute of frauds, provides:

“In the following cases the agreement is invalid, unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents:

“4. An agreement for the sale of goods at a price not less than two hundred dollars, unless the buyer accept and receive part of such goods or pay, at the time, some part of the purchase money;”

Appellant contends that the letters above set forth constitute a memorandum as contemplated by that section of the

Points Decided.

code. This contention cannot be sustained. The rule applicable to this case is stated in 20 Cyc. 258, as follows:

"In order to render an oral contract falling within the scope of the statute of frauds enforceable by action, the memorandum thereof must state the contract with such certainty that its essentials can be known from the memorandum itself, or by a reference contained in it to some other writing, without recourse to parol proof to supply them." (*Thompson v. Burns*, 15 Ida. 572, 99 Pac. 111; *Crowell v. Ewing*, 4 Cal. App. 358, 88 Pac. 285; *Campbell v. Western Basket & Barrel Co.*, 87 Wash. 73, 151 Pac. 103.)

These letters do not state the contract between the parties nor purport to give the essentials thereof or refer to any other writing from which they may be obtained, and since recourse to parol proof would be necessary to supply these essentials the documentary evidence offered was properly excluded under the provisions of sec. 6009, above quoted.

The judgment of the trial court is affirmed. Costs are awarded to respondent.

Budge, C. J., and Rice, J., concur.

Petition for rehearing denied.

(June 26, 1917.)

JULIE A. McKEEHAN, Respondent, v. VOLLMER-CLEARWATER COMPANY, LIMITED, a Corporation, Appellant.

[166 Pac. 256.]

HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—ESTOPPEL OF WIFE—EVIDENCE—APPEAL—HARMLESS ERROR.

1. Where in a trial to the court without a jury, the court denies a motion to strike testimony as to the receipt of money by draft in exchange for the return of a deed, based on the ground that the deed and draft are the best evidence, and testimony is subsequently

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introduced showing that the deed was burned and never recorded, that the person who sent the draft for the drawer thereof was dead, that neither the drawer nor drawee knew where the draft was procured and that the records of the bank at which the draft was cashed were lost or destroyed, the error in refusing to strike the testimony was not prejudicial.

2. In a suit by a wife to quiet title to real estate, sold on execution against her husband, evidence *held* sufficient to support the finding that the property was purchased with the separate funds of the wife and not with the proceeds of a sale of community property.

3. Where there is a conflict of evidence as to whether property claimed as separate property of the wife was purchased out of the proceeds of the sale of community property, and the trial court finds that it was not so purchased, the finding will not be disturbed.

4. A married woman purchased real property with her own funds, allowing her husband to act as her agent in the transaction and the title was taken in the name of her husband contrary to her instructions. The wife, being unable to read, believed her husband's statement that the title was in her name, and nothing happened to put her on inquiry or arouse her suspicions to the contrary.

5. *Held*, that she was not estopped to claim title as against an execution creditor of her husband.

[As to when resulting trust arises in favor of either husband or wife, 127 Am. St. 252.]

APPEAL from the District Court of the Second Judicial District, for Latah County. Hon. Edgar C. Steele, Judge.

Action to quiet title. Decree for plaintiff. *Affirmed.*

A. H. Oversmith, for Appellant.

"In transactions of this kind between husband and wife, where the wife is attempting to protect property which she claims is her separate property from the debts of her husband, which has been standing in his name, the evidence ought to be clear and convincing, and the best evidence that can be produced ought to be presented on the trial." (*Chaney v. Gould Co.*, 28 Ida. 76, 152 Pac. 468; 17 Cyc. 465; *Mendenhall v. Elwert*, 36 Or. 375, 52 Pac. 22, 59 Pac. 805; *Meyer v. Kinzer*, 12 Cal. 247, 73 Am. Dec. 538.)

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A married woman may be estopped from claiming her separate property if she has allowed the title to remain in the name of her husband by creditor who relies upon the record title and extends credit by reason of the apparent ownership of the property. (*Chaney v. Gauld, supra*; *First Nat. Bank v. Kissare*, 22 Okl. 545, 132 Am. St. 644, 98 Pac. 433; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Kalinowski v. McNeny*, 68 Wash. 681, 123 Pac. 1074.) Neither is the fact that the plaintiff could not read or write sufficient to raise the bar of estoppel. (*Constantine v. McDonald*, 25 Ida. 342, 137 Pac. 531.)

G. W. Suppiger and M. T. Curry, for Respondent.

“Wife is not, as against creditors of her husband, estopped from claiming that lands standing in his name were purchased with her separate estate.” (*De Berry v. Wheeler*, 128 Mo. 84, 49 Am. St. 538, 30 S. W. 338; *Murphy v. Clayton*, 113 Cal. 153, 45 Pac. 267; *Breeze v. Brooks*, 97 Cal. 72, 31 Pac. 743, 22 L. R. A. 256; 71 Cal. 169, 9 Pac. 670, 11 Pac. 885; *Kemp v. Folsom*, 14 Wash. 16, 43 Pac. 1100; *Garner v. Second Nat. Bank*, 151 U. S. 420, 14 Sup. Ct. 390, 38 L. ed. 218.)

Only the best evidence in existence must be produced. (*Lawrence v. Corbeille*, 28 Ida. 329, 154 Pac. 495; 17 Cyc. 518; 2 Ency. Evidence, 308.)

If a wife entrusts money of her separate estate to her husband, on the understanding that he is to invest it in real estate for her benefit, and take the title in her name, and he uses the money in purchasing the land, but takes the title in his own name, a trust results in favor of the wife. (*Martin v. Remington*, 100 Wis. 540, 69 Am. St. 941, 76 N. W. 614; *English v. Law*, 27 Kan. 242; *Howard v. Howard*, 52 Kan. 469, 34 Pac. 1114; *Heinrich v. Heinrich*, 2 Cal. App. 479, 84 Pac. 326; *Riley v. Martinelli*, 97 Cal. 575, 33 Am. St. 209, 32 Pac. 579, 21 L. R. A. 33; *Murphy v. Clayton, supra*.)

FLYNN, District Judge.—Claiming certain real estate as her separate property, respondent, a married woman, sues to

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quiet title thereto as against a deed obtained by appellant under an execution issued against respondent's husband. The cause was tried to the court and findings and decree were made in favor of respondent.

The principal errors assigned are the insufficiency of the evidence to support the findings, error in finding that the respondent is not estopped to assert claim to the property, and error as to the admission and rejection of certain evidence.

The record discloses that respondent and her husband are totally illiterate, neither one being able to read or write. Respondent testified that on May, 1904, she received \$750 from her father in lieu of certain real estate located in the mountains of Tennessee, which he had deeded to her as a gift nine or ten years before; that her father wrote to her asking her if she would rather have \$750 instead of the land; that she assented to this proposition and had the original deed returned to him with instructions to send the money in her husband's name; that the reason she directed it to be sent in her husband's name was that she was sick and could not look after anything; that her husband cashed the draft, which came in a letter, bringing the amount to her in gold.

At the conclusion of her evidence, no objection thereto having been theretofore made, a motion was made to strike her testimony with reference to getting the money from her father by a draft, and with reference to getting the money out of the land, for the reason that the testimony is merely secondary and is not the best evidence, and that the written deed from her for this land and the canceled draft are the best evidence. This motion was denied and the ruling of the court thereon is assigned as error.

As indicated in the opinion of this court in *Chaney v. Gauld Company*, 28 Ida. 76, 152 Pac. 468, this motion should have been granted; but, inasmuch as this was a trial to the court without a jury and respondent's son subsequently testified that he had returned the deed at her request to respondent's father, and respondent's father and sister testified that the deed had been burned by the father on its return to him, and

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that it had never been recorded, and, inasmuch as there was also subsequent testimony to show that the draft or check sent by the father had been so sent by the sister and wife of the father, and that they were dead, and that he did not know at what bank they got the check or draft; and there was also testimony on the part of the cashier of the Pullman Bank that he had some recollection of McKeehan having received some money by check from Tennessee, and it was also shown that the remittance sheets and records of the Pullman Bank were lost or destroyed, we think the error was harmless.

After selling their homestead, respondent and her husband moved to Pullman, Washington, in February, 1904. Respondent testified that because she could not count or tell the denomination of any money except gold or silver, she caused her husband, to whom the check or draft was sent by her father, to obtain gold coin therefor. She claims to have thereafter kept the coin in a sack between the feather bed and straw tick, and during her occasional absence from home to have transferred it to a baking-powder can hidden in a carefully concealed hole in the chicken-house. Early in the fall of 1904, respondent began to look for a place that she would be able to pay for with her own money, and in the spring following, she learned of the tract of land in controversy. She sent her husband to look at the land, and on his favorable report, gave him \$40 in gold coin to bind a bargain for the land. The husband paid this money to the owner's agent with the understanding that he was to return in a few days to obtain the deed. Respondent gave her husband \$610, in gold coin, the amount necessary to complete the purchase price of the land, and instructed him to take the deed in her name. The husband, failing to meet the agent at the agreed place, returned home and gave the money back to his wife, depleted, however, to the extent of \$105, or \$110, which the husband used to pay off a chattel mortgage on some cattle belonging to a friend, the cattle subsequently being traded in as a part of the purchase price and going in part to the mortgagee and in part to the vendor of the land. The respondent had no knowledge of this transaction, and, apparently, no

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knowledge of the diminution of her hoarded gold until after this suit was commenced. A few days after the chattel mortgage transaction, the agent who sold the land came to Pullman, where the McKeehans lived, bringing the deed with him, and the balance of the purchase price, less the amount of a mortgage on the land, was delivered in gold by respondent to her husband and by him paid to the agent.

There is no evidence to show that the husband requested that the deed be made in his wife's name, in conformity with her instructions to him; and in the deed the husband was named as grantee. The husband gave the deed to his wife, and in response to her inquiry as to whether he had the deed fixed the way she told him to, he told her he "guessed it was." She put the deed away in a keepsake box where it remained until December, 1905, when it was recorded at her husband's suggestion.

During all of this time, and up to the time when the land was sold under execution in May, 1913, respondent did not know that title thereto stood in her husband's name and believed that the legal title was in her own name.

In May, 1905, respondent gave her husband three hundred dollars in gold coin to pay on the mortgage, all of which, except five dollars, was so applied. Later, during the same year, all the balance of the mortgage, except the five dollars, was paid, through her husband, out of her gold coin, and the five dollar balance was paid by delivering a hog to the mortgagee in June, 1907, and the release recorded. In the fall of 1905, the McKeehans, with their family, moved on the land, and since that time have maintained their residence there. McKeehan began dealing with appellant company and was also engaged in hauling wood, in farming and in working on the farm of appellant's manager.

Respondent did not know that her husband was getting credit of the company, but at all times believed that he had money due by reason of wood and other products delivered. By no word or act did she indicate that she knew that the title to her land stood in the name of her husband, nor did

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she in any manner lead appellant to extend credit to her husband.

On April 8th, 1911, McKeehan confessed judgment in favor of appellant company in the sum of \$1,050, and execution thereon was issued on April 2d, 1913, the sale being advertised to take place on May 3d, 1913. A day or two before the date of sale, a neighbor informed respondent that her place was about to be sold, and the next morning respondent left for Moscow to consult an attorney for the purpose of protecting her property. Notice of her claims was given at the sheriff's sale and subsequently this action was brought.

Appellant claimed that the property in dispute was purchased with the proceeds of the sale of the homestead owned by the respondent and her husband but introduced no direct evidence on this point. There is ample evidence in the record to show how this money was spent. Appellant introduced checks to show that during February and March, 1904, the respondent's husband drew from the Pullman bank \$1,605, being the total amount deposited by him after the sale of the homestead; but even if these checks should justify the inference that out of this money came the money used to purchase the land in dispute, we are satisfied that they could have no greater effect in this connection than to make a conflict of the evidence, and, under the familiar rule, this court, under such a condition of the record, will not disturb the finding of the trial court.

Respondent's evidence as to the existence of the deed from her father, and as to the possession of the money in gold, is corroborated in numerous details by her husband, her father, her sister and her son, and while we are in accord with the rule that in a suit of this nature the testimony of relatives should be closely scrutinized, we are confronted with the fact that there is no direct evidence contradicting their story. Under this condition of the record, we hold that the evidence is sufficient to support the finding that the property in dispute was purchased with the separate funds of respondent and was her sole and separate property.

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The contention is further made that respondent is estopped under the facts from claiming this property as her separate property, and in support of this contention the decision of this court in the case of *Chaney v. The Gauld Company, supra*, is relied on. It will be remembered that in this case both the husband and wife are wholly illiterate. The trial court found that respondent did not know that the title was not in her name, and the evidence supports such finding. Assuming that appellant company gave credit to respondent's husband on the strength of his being the holder of the record title, a doubtful assumption under the record, we think that the rule of estoppel announced in the *Chaney v. The Gauld Company Case* is not applicable where there is no evidence to show that the wife knew or should have known that the title to her property was in her husband's name. Respondent relied on her husband's assurance that title to property purchased with her money, was taken in her own name. She did or said nothing to anyone to indicate a contrary belief or knowledge, nor was anything brought home to her in any way to cause her to make inquiry or arouse her suspicions that the title was in the name of her husband. She could not read the deed; her husband could not read it. As between the appellant company and the respondent, there was no duty on her part to procure someone to read it for her, because the company was not at the time the deed was received or recorded even remotely or indirectly interested, and if the duty of the respondent to ascertain the contents of the deed subsequently arose, there is nothing in the record to show how or when it arose. This is not a case where a wife knowingly permitted the title to her land to stand in the name of the husband, or permitted such condition of the record through negligence or carelessness, and thereby left the way open to the husband to procure credit on the strength of his record title. Knowledge, either actual or implied, on the part of the wife that the title is in her husband's name is a prerequisite to estoppel in such a case. We think that the wife is not estopped to claim title here.

Points Decided.

The errors assigned as to the rejection of certain testimony are not discussed in argument or brief, and therefore we feel that it is not necessary for us to pass on them.

The decree should be affirmed, and it is so ordered. Costs awarded to respondent.

Budge, C. J., and Rice, J., concur.

(June 27, 1917.)

JOSEPH SACCAMONNO, Respondent, v. GREAT NORTHERN RAILWAY COMPANY, a Corporation, Appellant.

[166 Pac. 267.]

DUTY OF RAILROADS TO MAINTAIN GATES AND FENCES—STATUTORY CONSTRUCTION—WISDOM OF LEGISLATIVE ACT NOT MATTER FOR JUDICIAL DETERMINATION — INSTRUCTIONS — GIVING OF INSTRUCTIONS TOO FAVORABLE TO APPELLANT NOT REVERSIBLE ERROR—JURY PRESUMED TO FOLLOW INSTRUCTIONS—CONFLICT IN EVIDENCE.

1. The gates at private railroad crossings provided for in section 2815, Rev. Codes, as amended (Sess. Laws 1911, p. 706), are a part of the fence which it is made the duty of the railroad company to maintain, and it is equally its duty under said statute to keep such gates securely closed, so as to afford the same protection from stock getting on its right of way at such places as at other points.

2. The fact that the legislature in amending section 2815, Rev. Codes, omitted the latter portion of said section, as follows: "No recovery can be had on account of stock injured or killed which come upon said highway [right of way] by reason of failure to keep such gates closed," indicates the legislative intent to require railroad companies to maintain gates at private crossings and keep them closed, in order to relieve themselves from liability under said section as amended, in so far as third parties and the public are concerned.

3. The wisdom or policy of a legislative act which imposes upon railroad companies a duty to keep gates closed for private crossings of their tracks and makes them liable for failure without knowl-

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edge to keep such gates closed, is not a matter for judicial consideration, nor will the court interfere with the legislative policy of imposing liability upon railroad companies for failure to keep their rights of way fully protected, where under the statute it is their duty to fence their tracks and keep their gates closed.

4. Where a jury might have arrived at their verdict upon different theories of the case, one of which would involve disregard of the instructions of the court, and the other a due regard for such instructions, it must be presumed that the jury followed the court's instructions in arriving at their verdict.

5. Where there is a substantial conflict in the evidence the verdict of the jury will not be disturbed.

6. Where certain instructions of the trial court are erroneous, but are in fact more favorable to appellant than a correct statement of the law would justify, appellant cannot be said to have been prejudiced by the giving of such instructions, and is not in a position to complain of the verdict arrived at, on the ground that such instructions were given.

[As to the failure of railroad company to comply with statute in fencing as negligence, see note in *Ann. Cas.* 1912D, 1106.]

APPEAL from the District Court of the Eighth Judicial District, for Bonner County. Hon. John M. Flynn, Judge.

Action against the Great Northern Railway Company to recover damages for the killing of plaintiff's horse. Judgment for plaintiff. *Affirmed.*

Charles S. Albert, Thos. Balmer and H. H. Taylor, for Appellant.

There was no evidence to show that the plaintiff's horse got upon the right of way of the defendant at a point where it was required to fence, and the evidence does show that it got in through a gate, which it was not required to keep closed.

Under these facts judgment should be ordered for the defendant. (*Reid v. San Pedro L. A. & S. L. R. Co.*, 39 Utah, 617, 118 Pac. 1009; *Missouri K. & T. Ry. Co. v. Johnson* (Tex. Civ.), 39 S. W. 323; *Rhines v. Chicago & N. W. Ry. Co.*, 75 Iowa, 597, 39 N. W. 912; *Louisville N. A. & C. Ry. Co. v. Goodbar*, 102 Ind. 596, 2 N. E. 337, 3 N. E. 162; *Louisville E. & St.*

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Louis Ry. Co. v. Thomas, 106 Ind. 10, 5 N. E. 198; *Bremmer v. Green Bay S. P. & N. Ry. Co.*, 61 Wis. 114, 20 N. W. 687; *Johnson v. Chicago, R. I. & P. Ry. Co.*, 55 Iowa, 707, 8 N. W. 664; *Great Western Ry. Co. v. Hanks*, 36 Ill. 281; *Souders v. St. Louis & S. F. R. Co.*, 127 Mo. App. 119, 104 S. W. 1122; *Creson v. Missouri K. & T. Ry. Co.*, 152 Mo. App. 197, 133 S. W. 57; *Lynn v. St. Louis, I. M. & S. Ry. Co.*, 164 Mo. App. 445, 146 S. W. 451; *Kimball v. St. Louis & S. F. Ry. Co.*, 99 Mo. App. 335, 73 S. W. 224.)

Under the circumstances in this case, there is no liability on the part of the defendant, where it appears that when the defendant's employees left the gate at night it was closed so it could not be opened by an animal. (*Swanson v. Chicago M. & St. P. Ry. Co.*, 79 Minn. 398, 82 N. W. 670, 49 L. R. A. 625; *Mooers v. Northern Pac. Ry. Co.*, 80 Minn. 24, 82 N. W. 1085; *Atchison etc. Ry. Co. v. Kavanaugh*, 163 Mo. 54, 63 S. W. 374.)

Where a private crossing communicating with gates in the right of way fence, through an inclosure, was constructed by the railway company, it was not the duty of such company to see that such gates were kept closed. (*San Antonio etc. Ry. Co. v. Robinson*, 17 Tex. Civ. 400, 43 S. W. 76; *Whaley v. Erie Ry. Co.*, 181 N. Y. 448, 74 N. E. 417.)

O. J. Bandelin and C. L. Heitman, for Respondent.

The statutory provision in case proper fences have been properly maintained and erected, that proof of the killing of the horse shall be *prima facie* evidence of negligence or wilfulness, means that all that is incumbent upon the part of the plaintiff in such a case to establish, is the killing of a horse upon the railroad company's right of way by one of its trains at a place where there is a duty to fence. It will not apply where the animal was killed upon a public crossing. (*Yates v. Camas Prairie Railroad Co.*, 22 Ida. 802, 128 Pac. 545.)

Even had this statute not been enacted, the circumstances of the killing of this horse threw upon the defendant the bur-

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den of showing that it had not been negligent. (*Kelly v. Oregon Short Line etc. R. Co.*, 4 Ida. 190, 38 Pac. 404.)

Defendant is liable even though the horse may have come through the gate. (*Missouri etc. Ry. Co. v. Bellows* (Tex. Civ.), 39 S. W. 1000; *Duncan v. St. Louis I. M. & S. Ry. Co.*, 91 Mo. 67, 3 S. W. 835; *Atkinson v. Chicago & N. W. Ry. Co.*, 119 Wis. 176, 96 N. W. 529.)

The presumption is that the horse came on track where killed. (*Patrie v. Oregon Short Line R. Co.*, 6 Ida. 448, 56 Pac. 82.)

BUDGE, C. J.—Respondent brought suit against appellant, a railroad corporation, alleging in substance that it had failed to construct and maintain a lawful fence along its right of way, by reason of which negligence and failure respondent's horse entered upon appellant's right of way, about two miles east of Priest River, Idaho, on the 22d day of November, 1914, and was struck and killed by one of appellant's trains.

Appellant answered, denying its failure to construct and maintain such lawful fence, denying any negligence on its part in the respect complained of, and denying that appellant's train or locomotive engine killed the horse.

The evidence on behalf of respondent showed that he turned his horse out in his pasture or field on Saturday; that along that part of the right of way in question a portion of the fence was up and portions of the fence were down, having been destroyed by fire a few months prior thereto; that on Sunday morning following the horse was found dead on the right of way, and blood and horsehair were found along the track where the animal had probably been struck. The evidence does not disclose whether the fence, along the right of way immediately at the place where the horse was killed, was up or down.

The evidence on the part of appellant was to the effect that the section foreman found the horse dead upon the right of way on Monday morning; that the horse was shod in front and not shod behind; that in an endeavor to ascertain where the horse entered upon the right of way the section foreman,

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in company with others, tracked the horse back along the right of way to a gate in the fence, at the private crossing of a third party, where the tracks showed that the horse had entered and gone on down the right of way to the place where it was killed; that the section foreman had passed along by the gate Saturday night, at which time the gate was closed and in good condition, and was such a gate that it could not be opened without human agency.

The court instructed the jury that if they found that the horse entered the right of way through the gate the verdict must be for the appellant. The jury returned a verdict for respondent for \$150 and \$50 attorneys' fees, and judgment was entered thereon for respondent. This appeal is from the judgment.

Appellant relies upon seven assignments of error. It will be necessary in this opinion to discuss only those points raised by the 5th and 7th assignments of error, which are in substance that the court erred in denying appellant's motion to direct a verdict in its favor, and in entering judgment for respondent.

It is apparent from the verdict which the jury returned, either that they disregarded the instructions of the court or that they found that the horse entered upon the right of way at a point where the fence was down and where it was the duty of appellant to maintain a lawful fence. The presumption is that the jury followed the court's instructions.

An examination of the record discloses the fact that there is some evidence tending to support the finding of the jury that the horse went upon the right of way at some point where the appellant was required to fence. There is a direct conflict in the evidence as to whether the fence was up in places and down in places near the point where the horse was killed. While there is no direct proof as to the exact point where the horse entered upon the right of way, there is ample evidence to support the finding of the jury that the fence was down at various places in the immediate vicinity, where the horse was found dead, and that the horse was killed by appellant company at or near a point where it was required

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to fence. And we do not think the mere absence of direct and positive proof that the horse went upon the right of way at a particular point, in view of the fact that the fence was down in numerous places in the immediate vicinity, would defeat respondent's right of recovery. (*Evansville & T. H. R. Co. v. Mosier*, 101 Ind. 597, 1 N. E. 197; *Kimball v. St. Louis & S. F. Ry. Co.*, 99 Mo. App. 335, 73 S. W. 224; *Creson v. Missouri K. & T. Ry. Co.*, 152 Mo. App. 197, 133 S. W. 57; *Louisville, N. A. & C. Ry. Co. v. Spain*, 61 Ind. 460.)

Under the well-established rule in this state, where, as in this case, there is a substantial conflict in the evidence, the verdict of the jury is conclusive. And since the jury evidently accepted the testimony offered by the witnesses for the respondent they must have found, under the instructions of the court, that the fence was down at a point where appellant was legally required to fence and that the horse did not come through the gate, as testified by appellant's employees, but came upon the right of way through the broken fence. (*Kimball v. St. Louis & S. F. R. Co.*, *supra*.)

It is contended by appellant, that if the horse entered upon the right of way through the gate at the private crossing, it would not be liable in damages. With this contention we are not in accord. Section 2815, Rev. Codes, as amended by c. 223, Sess. Laws 1911, p. 706, provides, *inter alia*:

“Every railroad company or corporation operating any steam or electric railroad in this State shall erect and maintain lawful fences, . . . where the same passes through or along inclosed or adjoining cultivated fields or inclosed lands, with proper and necessary openings and gates therein and farm crossings; . . . and such railroad company or corporation shall also be liable in a civil action to any and all persons who may sustain any loss, injury or damage by the wounding, maiming or killing of any horse, . . . which shall be done by such railroad company or corporation, or its agents or servants in the operation or management of engines, . . . if any such animal or animals escape from ad-

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joining lands and come upon the right of way or railroad tracks of such railroad company or corporation, occasioned by the failure of such railroad company or corporation to construct and maintain such fences, gates, farm crossings or cattle guards, whether the person or persons operating or in charge of such engine, cars or other rolling stock were guilty of negligence or not; ”

The above-amended section excluded the latter portion of section 2815, Rev. Codes, wherein it is provided:

“No recovery can be had on account of stock injured or killed which come upon said highway [right of way] by reason of failure to keep such gates closed.”

The fact that the legislature, when amending this section, omitted the proviso just quoted, would clearly indicate an intention on its part to require railroad companies to maintain gates at private crossings and keep them closed, in order to relieve themselves from liability under the foregoing section, in so far as third parties and the public are concerned. (Lewis' Sutherland Stat. Con., sec. 412.)

An examination of sections 4308 and 4309, Rev. Codes of Montana, 1907, and section 2815, Rev. Codes, as amended *supra*, discloses the fact that in substance these statutes are identical.

In the case of *Scheffer v. Chicago M. & P. S. Ry. Co.*, 53 Mont. 302, 163 Pac. 565, the supreme court of Montana, in construing sections 4308 and 4309, held that railroad companies are required to make and maintain gates and sufficient fences on both sides of their tracks or respond in damages for domestic animals killed or injured by reason of their failure to do so, unless the owner of the animals is at fault; that the statute is not satisfied by the construction of a fence sufficient to meet its requirements, but that a continuing obligation is imposed to maintain such fences in such a condition as to effectuate the purpose intended; that gates at private crossings are a part of the right of way fence, and the statute imposes upon the railway company the duty to see that they are kept closed, and the failure to keep them closed is negligence

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per se, in so far as the public and third parties are concerned. In support of this holding the court cites the case of *Wabash Ry. Co. v. Williamson*, 104 Ind. 154, 3 N. E. 814, where the court says:

“While a railroad company is not liable for killing stock belonging to one who has been permitted to erect a gate at a private crossing for his own convenience, where the cattle entered upon the track through the gate, yet it is liable in such case for killing stock belonging to a third person.”

This same rule is announced in the cases of *Evansville & T. H. & R. Co. v. Mosier*, *supra*, *Louisville N. A. & C. Ry. Co. v. Hughes*, 2 Ind. App. 68, 28 N. E. 158. See, also, *Louisville N. A. & C. Ry. Co. v. Spain*, *supra*; *Browne v. Providence etc. Co.*, 12 Gray (78 Mass.), 55, 71 Am. Dec. 736.

A reasonable construction of section 2815, Rev. Codes, as amended, *supra*, requires every railroad company to erect and maintain fences, with gates at private crossings, at places where they are required to fence, which gates so maintained, shall be kept closed by such railroad company, as far as third parties and the public are concerned. These gates are a part of the fence. (*Brown v. Oregon Short Line R. R. Co.*, 20 Ida. 364, 118 Pac. 768.) This duty of the railroad company to keep its fences in repair includes the duty to keep the gates securely closed so as to afford equal protection from stock getting on their roads at such places, as at other places.

The wisdom or policy of the legislature in imposing such duties upon railroad companies, and holding them liable, in the absence of knowledge, for failure to keep the gates closed, is not within the proper province of this court, nor can this court interfere with the legislative policies relating to the liability of railroad companies for failure to fence their rights of way, where it is their duty to fence under the statute and to keep their gates closed. That the rule may be a harsh one is no defense; the legislature is the only source capable of affording relief.

The instructions of the court above referred to were erroneous, but were much more favorable to appellant than, in

Points Decided.

our view of the law, was permissible. Appellant has not been prejudiced thereby and is not in a position to complain of the verdict.

The judgment is affirmed. Costs awarded to respondent.

Morgan and Rice, JJ., concur.

(June 28, 1917.)

J. L. BATES, Respondent, v. D. W. PRICE, Appellant.

[166 Pac. 261.]

APPEAL FROM PROBATE TO DISTRICT COURT—FAILURE TO SERVE NOTICE OF APPEAL—WAIVER—JURISDICTION—MISCONDUCT OF COUNSEL—PREJUDICIAL REMARKS TO JURY—EVIDENCE—PARTNERSHIP—ASSIGNMENT OF PARTNERSHIP ACCOUNTS—RECEIVERSHIP—SCOPE OF COURT ORDER—IRREGULAR VERDICT—CORRECTION OF.

1. Where an appeal was taken from the probate court to the district court and notice of appeal was not served, but nevertheless the party opposing the appeal voluntarily appeared and asked leave to file an answer and proceeded to a trial of the cause without raising any objection to the jurisdiction of the court upon the ground of lack of notice, such procedure amounts to a waiver of the absence of notice of appeal, and the question cannot be raised for the first time on appeal to the supreme court.

2. Statements of counsel to the jury which are not justified by anything in the record and are manifestly made for the purpose of inciting the passion or prejudice of the jury, constitute reversible error, unless it appears from the whole record that the jury could not lawfully have reached any other conclusion than they did.

3. Held, that misconduct of counsel in this case in addressing prejudicial remarks to the jury did not constitute reversible error, since it appears from the record that the verdict of the jury was fully justified by the evidence adduced on the trial.

4. A partner has full power to transact the whole business of the firm of which he is a partner, and may bind his partner or partners in such transactions as entirely as himself, and his assignment in good faith of accounts payable to the firm, to a creditor

Argument for Appellant.

of the firm in payment of partnership indebtedness, is binding upon the partnership.

5. An order of court appointing a receiver and defining his authority, which specifies the property to be taken possession of by such receiver, closing with the clause: "and all that goes with the livery business connected with the Charles L. Hollar barn," cannot be so construed as to include outstanding accounts or bills receivable, in the absence of the specific inclusion of such accounts.

6. *Held*, that appellant had no authority as receiver to collect the accounts in question, and that when he accepted them for collection from respondent he did so in his private capacity, and was therefore liable to respondent for the amounts collected thereon.

7. When a jury brings in a verdict which by inadvertence expresses a conclusion manifestly at variance with the real intention of the jury, it is the duty of the court, upon ascertaining such mistake, to send the jury back in order that they may return a verdict in proper form.

8. *Held*, that the trial court committed no error in regard to the admission of evidence, the giving of certain instructions and refusal to give certain offered instructions, and in refusing to grant appellant a new trial.

[As to misconduct of counsel in argument to jury as cause for new trial, see note in 9 Am. St. 559.]

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. William W. Woods, Judge.

Action for money had and received. Judgment for plaintiff. *Affirmed*.

James A. Wayne, for Appellant.

The district court acquired no jurisdiction to grant to the plaintiff a trial *de novo*, and the lack of jurisdiction in the district court can be raised at any time, and was not waived by a failure to object to the jurisdiction of the court by demurrer or answer; neither was it waived by proceeding to trial without objection. (*Aram v. Edwards*, 9 Ida. 333, 74 Pac. 961.)

This court has had occasion to discuss the impropriety of remarks similar to those of counsel in this case, when made in

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the course of a trial, and under these decisions the remarks of counsel in this case constitute reversible error. (*Goldstone v. Rustemeyer*, 21 Ida. 703, 123 Pac. 635; *Petajaniemi v. Washington Water Power Co.*, 22 Ida. 20-28, 124 Pac. 783; *Powers v. Boise City*, 22 Ida. 286, 125 Pac. 194; *McLean v. Hayden Creek Mining Co.*, 25 Ida. 416, 138 Pac. 331; *State v. Harness*, 10 Ida. 18, 76 Pac. 788; *State v. O'Neil*, 24 Ida. 582, 599, 135 Pac. 60.)

T. P. Wormward and Chas. E. Miller, for Respondent.

Alleged errors which were not, but could have been, called to the attention of the court below, will not be entertained, for the first time, on appeal to this court. (*Smith v. Sterling*, 1 Ida. 128; *Miller v. Donovan*, 11 Ida. 545, 83 Pac. 608; *Marysville M. Co. v. Home Fire Ins. Co.*, 21 Ida. 377, 121 Pac. 1026.)

In an ordinary trading partnership, either partner has an implied authority to pay debts from the assets of the firm, in the ordinary course of the business. (M. A. L. 343; *Benchley v. Chapin*, 10 Cush. (64 Mass.) 173.)

A judgment cannot be reversed because of improper remarks of counsel in his argument to the jury, to which no exception was taken. (*Mississippi Cent. R. Co. v. Turnage*, 95 Miss. 854, 49 So. 840, 24 L. R. A., N. S., 253.)

To warrant a reversal for remarks of counsel in his argument to the jury, they must be prejudicial. (*Pigford v. Norfolk S. R. Co.*, 160 N. C. 93, 75 S. E. 860, 44 L. R. A., N. S., 865.)

Improper argument by counsel will not require a reversal if from the whole case it is evident that it did not prejudice the rights of the complaining party. (*Paducah B. & B. Co. v. Parker*, 143 Ky. 607, 136 S. W. 1012, 43 L. R. A., N. S., 179.)

BUDGE, C. J.—This action was originally instituted and tried in the probate court of Shoshone county, where judgment was rendered in favor of the appellant. The case was then appealed to the district court and was there tried before

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a jury, resulting in a verdict and judgment for respondent. A motion for a new trial was denied, and this appeal is from the judgment and the order denying the motion for a new trial.

Respondent had been employed by Hollar & Plemmons, co-partners, engaged in the livery business at Kellogg, who were indebted to him for past services. One Barnhart and one Roberts were each indebted to Hollar & Plemmons and on October 6, 1914, Hollar gave respondent an order on Barnhart for \$229.50, signed Hollar & Plemmons, per M. E. Hollar, and an order on Roberts for \$105, signed M. E. Hollar, in payment of their indebtedness to respondent. Shortly thereafter, in an action brought by the First State Bank of Kellogg against Hollar & Plemmons for the foreclosure of several mortgages, appellant was appointed receiver of certain property belonging to them. Respondent thereafter turned the two above orders over to appellant to collect. Appellant collected the sum of \$292 on the two accounts and instead of turning the money over to respondent accounted for it in the receivership action. Respondent brought this action to recover the amount collected on the accounts, alleging that at the time they were turned over to appellant the latter agreed to collect the same and to immediately pay the money so collected over to respondent.

Appellant answered, admitting that he had received the orders from respondent, but denied that they were signed by Hollar & Plemmons and that Hollar & Plemmons had any authority to sign the orders, and denied that he agreed to collect the orders for respondent or to pay him the amount collected thereon, and alleged that the orders were delivered to him as receiver and collected in that capacity.

The evidence on behalf of respondent sustains the issues on his part and in rebuttal to appellant's testimony, to the effect that he had received the orders as receiver, respondent introduced the complaint and order in the receivership action, from which it appears that the receiver was authorized by the court to take possession of the property described in

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the mortgages, which were being foreclosed. One of the mortgages and the order, after describing in detail certain personal property, such as horses, rigs, wagons, sleighs, harness, whips, robes, sleighbells, hay and oats, contained the following clause: "And all that goes with the livery business connected with the Charles L. Hollar barn."

Numerous errors are assigned, and for the purpose of argument have been grouped by appellant as follows: First, the defective notice of appeal; second, errors committed by the trial court; third, misconduct of counsel for the plaintiff; and fourth, insufficiency of the evidence.

It appears that the notice of appeal from the probate to the district court contained only the following statement, with reference to the matter appealed from: "Plaintiff appeals . . . from the judgment of dismissal entered herein against him and in favor of defendant, on the 2d day of April, 1915, and from the whole thereof." It is contended by appellant that this notice was insufficient to give the district court jurisdiction of the cause, reliance being placed upon section 4838, Rev. Codes, which provides, among other things: "The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party. The notice must state whether the appeal is taken from the whole or a part of the judgment, and if from part, what part, and whether the appeal is taken on questions of law or fact, or both." The notice of appeal from the probate to the district court was never served on appellant. It appears from the record that appellant appeared in the district court, asked leave to file and did file an answer and tried the cause, without raising any objection to the jurisdiction upon the ground of the defective notice of appeal. The rule is well settled that, where an appeal is taken from a justice or probate court to the district court, a general appearance on the part of the one opposing the appeal waives all defects and irregularities on the proceedings for appeal. (24 Cyc. 694; *Shay v. Superior Court*, 57 Cal. 541; *Clafin v. American Nat. Bank*, 46 Neb. 884, 65 N. W. 1056; *McCombs v. Johnson*, 47 Mich. 592,

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11 N. W. 400; *Wrolson v. Anderson*, 53 Minn. 508, 55 N. W. 597.) The reason for the rule is well stated in the latter case as follows: "The district court has original jurisdiction without respect to the amount in controversy, and had jurisdiction of the subject matter of this action, if the parties voluntarily appeared and submitted the controversy to the court, which it is very clear they did do. After the pleadings were amended, and the case voluntarily set for trial, it was too late to move to dismiss, and the irregularity in the mode of bringing the case into the court in the first instance was waived. The parties appeared in the district court, and consented to the trial of a controversy, the subject of which was within the jurisdiction of the court."

Several errors are assigned as to the admission of evidence and to the giving and refusal to give certain instructions. We have carefully examined the record and are unable to find that the court committed any error in this respect.

During the course of his argument counsel for respondent stated: "So far as Dan Price is concerned, he is not going to lose anything. The Imperial State Bank of Kellogg will—." At which point he was interrupted by objection of opposing counsel. This statement to the jury is assigned as prejudicial misconduct of counsel. From the record it clearly appears that the statement is highly improper and was not based upon any matter properly in the case. We cannot countenance any counsel going outside of the record and injecting prejudicial statements as to matters not involved in the case. But the rule in such cases has been announced by this court in *Goldstone v. Rustmeyer*, 21 Ida. 703-8, 123 Pac. 635, as follows: "Counsel cannot deliberately go outside the evidence and attempt to incite the passions or the prejudice of the jury and have such conduct cured by an instruction to the jury at the close of the trial, to the effect that they must not consider such remarks, and where a judgment is obtained by such conduct a new trial must be granted, unless it affirmatively appears that the judgment was right and would have been the same in the absence of such unauthorized argument." In this case it affirmatively appears that, in the absence of the

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misconduct of counsel, the jury could not logically have reached any other verdict than they did. Misconduct of counsel is a matter, unfortunately, which this court has been obliged repeatedly to pass upon. (*Goldstone v. Rustemeyer, supra*; *Petajaniemi v. Washington Water Power Co.*, 22 Ida. 20, 124 Pac. 783; *Powers v. Boise City*, 22 Ida. 286, 125 Pac. 194; *McLean v. Hayden Creek Mining Co.*, 25 Ida. 416, 138 Pac. 331; *State v. Harness*, 10 Ida. 18, 76 Pac. 788; *State v. O'Neil*, 24 Ida. 582, 135 Pac. 60.)

This brings us to the discussion of the sufficiency of the evidence. It appears from the record that Hollar had signed these orders and delivered them to respondent before the papers in the receivership matter had been served upon either of the partners, and with the consent of Plemmons, his partner. Hollar's authority to give the orders is attacked. But it is a fundamental principle underlying the law of partnership "that a partner . . . has power to transact the whole business of the firm, whatever that may be, and consequently to bind his partners in such transactions as entirely as himself. This is a general power, essential to the well conducting of business, which is implied in the existence of a partnership. When, then, a partnership is formed for a particular purpose, it is understood to be in itself a grant of power to the acting members of the company to transact its business in the usual way." (*Winship v. Bank of United States*, 5 Pet. (30 U. S.) 529, 8 L. ed. 216-228; 1 Rowley Modern Law of Partnership, sec. 411 et seq., and numerous cases there cited.) That Hollar's act in giving these orders was sufficient to operate as an assignment of the partnership accounts, so far as appellant is concerned, is not open to question. The jury was justified in finding that these accounts were assigned before the receiver took charge, and consequently had become the absolute property of respondent.

But even if this were not true appellant cannot rely upon his authority as receiver as a defense, for that authority was limited by the order of the court, to the extent of taking into his possession the property described in the order above referred to. The clause "and all that goes with the livery

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business connected with the Charles L. Hollar barn" cannot be so construed as to include outstanding accounts or bills receivable. The doctrine of *noscitur a sociis*, applicable to this clause, precludes any such construction, and limits all things intended to be included in this omnibus clause to things and chattels similar in some respects to the other things and chattels specifically described and relating to and used in the livery business. Appellant had no authority as receiver to collect these accounts and when he accepted them from respondent for collection he did so in a private capacity, and was, therefore, liable for the amounts collected thereon.

Appellant further seeks to predicate error upon the receipt of the verdict. It appears that when the cause was submitted to the jury they were given two blank forms of verdict, one to be used in case they found for respondent and the other if they found for appellant. When the jury first came in to return their verdict it read as follows:

"Verdict 292,

"We the jury, in the above intitled action, find \$292.00 our verdict in favor of the defendant."

The clerk called the attention of the court to the irregularity in the form of the verdict, and the court, after consulting with the foreman of the jury sent them back to further consider their verdict, whereupon they immediately returned into court with the following verdict:

"Verdict.

"We, the jury in the above intitled cause, do hereby find for the plaintiff in the sum of 292 dollars."

It was the duty of the court, upon learning that the verdict was irregular, to send the jury back in order that they might return a verdict in proper form. (38 Cyc. 1893, and cases cited; *Chandler v. Hinds*, 135 Wis. 43, 115 N. W. 339.)

The trial court did not err in refusing to grant appellant a new trial. The judgment is affirmed. Costs awarded to respondent.

Morgan and Rice, JJ., concur.

Points Decided.

(June 28, 1917.)

MAGGIE A. BATES, Respondent, v. W. W. PAPESH,
Appellant.

[166 Pac. 270.]

HUSBAND AND WIFE — SEPARATE PROPERTY — BONA FIDE TRANSFER —
PREFERENCE—ACTION TO QUIET TITLE.

1. A wife, who loans the proceeds of her separate property to her husband, becomes one of his creditors, and her rights as such are governed by the same legal principles as the rights of any other creditor.

2. Whenever there is a true debt and a real transfer for an adequate consideration, there is no collusion, and fraud in its legal sense cannot be predicated thereon, even though the transfer result in a preference; nor does the fact that the creditor obtaining the preference is the debtor's wife operate to change or modify the rule.

3. B. and his wife while living in Montana made an agreement that the wife's earnings should be her separate property. These earnings she invested in cattle and horses, which were sold, B. retaining part of the proceeds of the sale and giving his wife his promissory note therefor, which was always treated by the parties as the wife's separate property. Afterward they moved to Idaho, and B. borrowed money of two different banks with which to buy a lot and build a house, giving his notes therefor. Subsequently he deeded this realty to his wife in payment of his note to her, the amount of which was substantially the value of the property. Some time thereafter the bank notes were reduced to a judgment, the lot attached and sold on execution to P. B.'s wife sued to quiet title.

Held, under the facts stated, that the note from B. to his wife was her separate property, making a *bona fide* creditor of her husband, subject to preference the same as any other creditor.

[As to conveyances and contracts between husband and wife, see note in 99 Am. Dec. 599.]

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. William W. Woods, Judge.

Action to quiet title. Judgment for plaintiff. *Affirmed*.

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Argument for Respondent.

James A. Wayne, for Appellant.

Lot 18 having admittedly been acquired during the existence of the marriage relationship between Bates and his wife, is presumed to be community property. (*Douglas v. Douglas*, 22 Ida. 336, 125 Pac. 796; *Humbird Lbr. Co. v. Doran*, 24 Ida. 507, 135 Pac. 66; *Chaney v. Gauld Co.*, 28 Ida. 76, 152 Pac. 468.)

Property purchased with borrowed money is community property. (*Northwestern etc. Bank v. Rauch*, 7 Ida. 152, 61 Pac. 516.)

The conveyance from Bates to his wife was made for the purpose, and with the intent, and had the direct effect of defrauding the creditors of the husband, to wit, the defendant in this case who had acquired the notes of both the creditor banks. (20 Cyc. 439.)

The deed from John L. Bates to Maggie A. Bates recites a fictitious consideration, which is in itself evidence of fraud. (20 Cyc. 441, and cases cited.)

When a conveyance of land is made by an insolvent debtor to one of his creditors in satisfaction of an antecedent debt and is attacked by other creditors of the grantor, the grantee must show that the consideration for it was both valuable and adequate. (*Mobile Savings Bank v. McDonnell*, 89 Ala. 434, 18 Am. St. 137, 8 So. 137, 9 L. R. A. 645; *Humes v. Scruggs*, 94 U. S. 22, 24 L. ed. 51.)

And this is doubly true when the antecedent creditor happens to be the wife of the grantor in the deed. (*Potts v. Rubesam* (Okla.), 156 Pac. 356; *Bank of Orofino v. Wellman*, 26 Ida. 425, 143 Pac. 1169.)

Chas. E. Miller, for Respondent.

Where property was purchased by a married woman in a foreign state and under the laws of that state such property became her separate property, and the property is thereafter brought into the state of Idaho, it will continue to be the separate property of the wife. (*Gooding Milling etc. Co. v. Lincoln County State Bank*, 22 Ida. 468, 126 Pac. 772.)

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When the husband relinquishes to the wife all claim to her separate earnings, no creditor complaining of that act, such gift on the part of the husband is absolute. (*Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695; *Douglas v. Douglas*, 22 Ida. 336, 125 Pac. 796.)

The state insolvency law having been superseded by the federal bankruptcy act, there is no law in this state prohibiting the preference of one creditor over another in the absence of collusion and fraud. (*Capital Lbr. Co. v. Saunders*, 26 Ida. 408, 143 Pac. 1178; *Wilkerson v. Aven*, 26 Ida. 559, 144 Pac. 1105.)

BUDGE, C. J.—This action was brought by respondent, Maggie A. Bates, for the purpose of quieting title in her to lot 18, block 4, Sunnyside addition to the city of Kellogg, Shoshone county. Appellant filed an answer and cross-complaint setting up an interest in the property adverse to respondent, under a purported sheriff's certificate of sale on execution to satisfy a judgment against respondent, John L. Bates, and alleging that he was the owner of the property, subject only to the right of redemption in the latter. And further alleging that the lot was purchased by John L. Bates on the 9th of October, 1913, from one Clarence C. Plemmons for the sum of \$160, which was loaned to Bates for that purpose by the First State Bank of Kellogg, the bank taking his promissory note therefor; that about April 1, 1914, Bates entered into an oral contract with one Bellinger for the construction of a frame dwelling-house upon the lot; that during the period of construction a consignment of materials arrived and that in order to take up the bill of lading, so as to enable him to have the materials delivered, Bates borrowed \$105 from the Weber Bank of Wardner, giving his promissory note therefor; that all payments upon the contract with Bellinger were made by John L. Bates except the sum of \$50.14; that the note to the First State Bank of Kellogg was renewed several times but that neither this note nor the one to the Weber Bank had ever been paid; that on the 11th day of December, 1914, Bates attempted by deed to convey the property to

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Maggie A. Bates, his wife; that said conveyance was without consideration and was made "for the purpose and with the intent of hindering, delaying and defrauding the creditors of the said John L. Bates from collecting their indebtedness against the said John L. Bates, and particularly for the purpose of defrauding the owners of said promissory notes"; that the notes had been assigned to appellant, who brought suit against Bates February 12, 1915; that in this suit judgment was recovered against Bates and on March 18, 1915, execution was issued and placed in the hands of the sheriff of Shoshone county, the property having been theretofore attached in the action, and the property was on April 17, 1915, sold at sheriff's sale, under said execution, to appellant, and asked to have Bates made a party plaintiff in the action.

Respondent, Maggie A. Bates, answered the cross-complaint, putting in issue the material allegations thereof and alleging affirmatively that the property had been sold and transferred to her by her husband in payment of a note for the sum of \$700, which note had theretofore been given to her by her husband for a loan of money which was the proceeds from a sale of her separate property and a valid and existing debt from her husband. John L. Bates filed a separate answer to the cross-complaint to the same effect.

The case was tried before the court without a jury. The court found, among other things, that the \$700 note represented a valid and subsisting indebtedness owing from Bates to his wife and was her separate property; and that the transfer of the lot to Mrs. Bates was not made to hinder, delay or defraud creditors, and gave her judgment, as prayed in her complaint. A motion for a new trial was overruled and this appeal is from the judgment and from the order overruling the motion for a new trial.

The record shows that the property was purchased and a house built thereon, as alleged in the pleadings; that the notes given for the purchase price of the lot and the materials were not paid at the time of the transfer of the property from Bates to his wife; that in 1903 respondents, as husband and wife, were employed on a ranch in Montana as foreman and

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cook and housekeeper, respectively; that there was an agreement between them that whatever Mrs. Bates should earn by her own labor should be her separate property; that she invested her earnings in horses and cattle and that these, with their increase, were sold along with the rest of the herd, which the family had accumulated, shortly before respondents came to Idaho; that from the sale of the horses and cattle belonging to Mrs. Bates something over \$1,000 was realized; that a portion of this sum was allowed to the husband for his services in connection with the care of the stock and that he gave the \$700 note to her for the balance, while they were still residing in Montana; that this note was in existence and unpaid at the time the property in question was transferred, and that in consideration for the transfer of the property she canceled the note and surrendered it to her husband; that the indebtedness represented by this note had been treated at all times by them as her separate property, both before and after coming to Idaho, and was a valid and existing debt long prior to the time that the indebtedness due the bank was incurred. The evidence further shows that it is undisputed that this note represented the proceeds from the sale of her separate property; that the property, at the time it was transferred to her, was worth eight or nine hundred dollars; and that at the time of the sheriff's sale Mrs. Bates' attorney appeared in her behalf, and before the property was struck off notified the sheriff and the purchaser that the property belonged to her. While there is some evidence which tends to show that Bates was seeking to prevent the First State Bank of Kellogg from satisfying its claim against him, there is abundant evidence to support the finding of the court that Mrs. Bates was a *bona fide* creditor of her husband to the extent of the \$700 expressed in the note, and that the transfer was not made to hinder, delay or defraud creditors.

The rule in such cases has been recently announced by this court as follows: "We think the rule to be that wherever there is a true debt and a real transfer for an adequate consideration, there is no collusion, and that fraud in its legal sense cannot be predicated on such a transaction. . . ."

Points Decided.

(*Pettengill v. Blackman*, ante, p. 241, 164 Pac. 358-62.) Whatever his motive may have been, under such circumstances, Bates had a right to prefer any *bona fide* creditor. (*Wilson v. Baker Clothing Co.*, 25 Ida. 378, 137 Pac. 896, 50 L. R. A., N. S., 239; *Capital Lumber Co. v. Saunders*, 26 Ida. 408, 143 Pac. 1178; *Pettengill v. Blackman*, supra.) Nor does the fact that one of his creditors happened to be his wife, operate to change or modify the rule. As was said in *Wilkerson v. Aven*, 26 Ida. 559-64, 144 Pac. 1105: "If the husband borrowed money from the wife, we fail to understand why he would not have as valid a right to pay her the money borrowed as he would to pay any of his creditors. . . . "

In this view, under the facts as found by the trial court, it cannot be said that there was any error in refusing to grant a new trial. The judgment is affirmed. Costs awarded to respondent.

Morgan, J., concurs; Rice, J., dissents.

(June 28, 1917.)

STATE, Respondent, v. ROY H. LEEPER, Appellant.

[165 Pac. 997.]

CRIMINAL LAW—BAIL—NOTICE OF APPEAL—DEFECTS IN FORM.

1. Failure to give a recognizance, as provided by sec. 8324, Rev. Codes, upon appeal to the district court does not defeat the jurisdiction of that court to hear the case, nor render the appeal subject to dismissal.

2. The giving of notice of appeal in the manner provided by sec. 8321, Rev. Codes, is necessary to the jurisdiction of the district court, but the failure to have affixed thereto the signature of the appellant or his attorney is a formal, rather than a jurisdictional, defect and may be waived.

APPEAL from the District Court of the Second Judicial District, in and for Clearwater County. Hon. Edgar C. Steele, Judge.

Opinion of the Court—Morgan, J.

Defendant was convicted, in the probate court, of disturbing the peace. His appeal to the district court was dismissed. *Reversed.*

Chas. L. McDonald, for Appellant.

Admission of due service of notice of appeal, is a waiver of irregular service, and, in general, any action which is equivalent to acknowledgment of notice, waives any defect in such notice. (*Wilson v. Wilson*, 6 Ida. 597, 601, 57 Pac. 708; *Cella v. Schnairs*, 42 Mo. App. 316.)

The respondent's attorneys in writing, admitted the service of a copy of a notice of appeal without objecting that it was signed by an attorney other than the attorney of record of the appellant. (*Livermore v. Webb*, 56 Cal. 489; *People v. Grigsby*, 62 Cal. 482; 2 Hayne, New Trial & Appeal, Rev. ed., secs. 208, 626; *Bigler v. Waller*, 12 Wall. (79 U. S.) 142, 20 L. ed. 260.)

"Acceptance of service is a waiver of defects in the notice." (*Kerlec v. New Orleans Land Co.*, 130 La. 111, 57 So. 647; *In re Great Southern Lbr. Co.*, 132 La. 989, 62 So. 117.)

No appearance for Respondent.

MORGAN, J.—Appellant was convicted, in the probate court of Clearwater county, of disturbing the peace. A transcript of the docket of the probate court shows that immediately upon the rendition of judgment he gave oral notice of his intention to appeal and, within ten days thereafter, filed a written notice of his appeal to the district court; also that, upon appellant's request, the bail bond theretofore given was refiled as a bond on appeal.

The notice, which appears to be regular in all other particulars, is unsigned. It bears the following indorsement: "Service of a true copy of the within notice of appeal is hereby admitted, by receipt thereof, this 10th day of March, A. D., 1915. F. E. Smith, County Attorney."

Respondent moved, in the district court, to dismiss the appeal upon the ground that the notice thereof was not suffi-

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cient to conform to the requirements of sec. 8321, Rev. Codes, and upon the further ground that no undertaking of bail, pending appeal, had been filed as provided by sec. 8324. The motion was granted and from the judgment and order of dismissal this appeal is prosecuted.

Sec. 8324 merely provides that a party appealing may, in order to be released from custody or if he desires a stay of proceedings under the judgment, enter into a recognizance for the payment of any judgment, fine and costs that may be awarded against him on appeal, and that he will faithfully prosecute the same and render himself in execution of any judgment or order entered against him in the district court.

Assuming that refiling the bail bond was not a substantial compliance with the requirements of sec. 8324, *supra*, it may be said that failure to comply therewith would only result in failure to stay the execution of the judgment of the probate court and would not defeat the jurisdiction of the district court to hear the case, nor render the appeal subject to dismissal. (*In re Schuster*, 25 Ida. 465, 138 Pac. 135.)

Sec. 8321, is as follows: "A defendant intending to appeal must give notice of his intention to do so at the time of the trial or rendition of the judgment, and must within ten days after the rendition and entry of the judgment, file with the judge or justice of the court wherein the conviction was had, and serve on the prosecuting attorney of the county, a notice of appeal, entitled in the action, setting forth the character of the judgment, and the intention of the defendant to appeal therefrom to the district court."

The giving of notice of appeal in the manner provided by the foregoing section of the code is necessary to the jurisdiction of the district court, but, it will be observed, the statute does not require the notice to be signed. Therefore, the failure to have affixed thereto the signature of the appellant or his attorney is a formal, rather than a jurisdictional, defect and may be waived. In this case the prosecuting attorney, by accepting service in the manner and form he employed, waived the defect occasioned by the notice not being signed. (*Wilson v. Wilson*, 6 Ida. 597, 57 Pac. 708; *People v. Schmitz*,

Points Decided.

7 Cal. App. 330, 94 Pac. 407, 419, 15 L. R. A., N. S., 717; *Livermore v. Webb*, 56 Cal. 489; *Cella v. Schnairs*, 42 Mo. App. 316.)

The judgment and order of dismissal are reversed and the cause remanded to the district court with direction to grant appellant a trial.

Budge, C. J., and Rice, J., concur.

(June 28, 1917.)

STATE, Respondent, v. ZACHARIAH CURTIS and CORA ATKINSON, Appellants.

[165 Pac. 999.]

CRIMINAL LAW—SUFFICIENCY OF EVIDENCE—INSTRUCTIONS—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

1. Where there is sufficient evidence, if uncontradicted, to justify a conviction, a verdict and judgment based thereon will not be reversed because of conflict in the testimony.

2. Persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid and abet in its commission, should be charged and tried as principals.

3. All instructions given in a case must be read and considered together, and where, taken as a whole, they correctly state the law and are not inconsistent, but may be reasonably and fairly harmonized, it will be assumed that the jury gave due consideration to the whole charge and was not misled by an isolated portion, which, considered alone, does not fully and clearly state the law applicable to the facts in the case.

4. Where affidavits of newly discovered evidence are merely cumulative or corroborative of testimony introduced at the trial, the order of the court denying a motion for a new trial will not be reversed upon appeal.

[As to what is cumulative evidence within rule excluding it when offered as newly discovered evidence in support of motion for new trial, see note in *Ann. Cas.* 1913D, 157.]

Opinion of the Court—Morgan, J.

APPEAL from the District Court of the Fourth Judicial District, for Twin Falls County. Hon. Wm. A. Babcock, Judge.

Defendants were convicted of grand larceny. *Affirmed.*

Guthrie & Bowen and H. C. Hazel, for Appellants.

"The court should not place a particular witness in undue prominence by charging the jury to find according to their belief or disbelief in his evidence." (1 Blashfield's Instructions to Juries, p. 347; *Thompson v. State*, 106 Ala. 67, 17 So. 512; *Fraser v. Haggerty*, 86 Mich. 521, 49 N. W. 616; *Chase v. Buhl Iron Works*, 55 Mich. 139, 20 N. W. 827; *People v. Simpson*, 48 Mich. 474, 12 N. W. 662; *Dolan v. President etc. Delaware & H. Canal Co.*, 71 N. Y. 285; *McGrath v. Metropolitan Life Ins. Co.*, 42 Hun (N. Y.), 655, 6 N. Y. St. 376; *Jackson v. Greene County Commrs.*, 76 N. C. 282; *Willey v. Gatling*, 70 N. C. 410; *Brem v. Allison*, 68 N. C. 412.)

T. A. Walters, Atty. Genl., J. P. Pope, Asst. Atty. Genl., Edwin H. Snow and Laurel Elam, for Respondent.

Where there is a substantial conflict in the evidence the verdict of the jury will not be disturbed upon appeal. (*Baker v. First Nat. Bank*, 25 Ida. 651, 139 Pac. 565; *Tilden v. Hubbard*, 25 Ida. 677, 138 Pac. 1133; *Henry Gold Mining Co. v. Henry*, 25 Ida. 333, 137 Pac. 523; *Huften v. Huften*, 25 Ida. 96, 136 Pac. 605; *Montgomery v. Gray*, 26 Ida. 583, 586, 144 Pac. 646.)

MORGAN, J.—Appellants were convicted of the larceny of a certain cow, the property of H. P. Larson. From the judgment of conviction and from an order denying their motion for a new trial they have appealed to this court.

The assignments of error question the sufficiency of the evidence to sustain the verdict, and it is particularly urged that appellant, Atkinson, is not shown to have unlawfully participated in taking the animal, nor to have been in any manner connected with the commission of the crime.

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It appears from the record that for about four years prior to the arrest of appellants, they had been residing upon what is known as the Curtis homestead where the cow was slaughtered. H. M. Pinkham, a witness for the state, testified that in December, 1914 (the exact date he was unable to fix), while he was employed by appellants, Curtis, early in the morning, left the place and Mrs. Atkinson stated he was going to the hills to get one of his steers; that later in the day he returned driving two head of cattle; that as he approached the premises Mrs. Atkinson took two cows from the corral and drove them out to meet the cattle Curtis was driving in order to lure them into the corral; that one of the animals driven by Curtis escaped but the other, being the cow alleged to have been stolen, and described by the witness as "a white-faced cow, crop off right ear, light red with bob-tail," was driven into the corral and was thereafter tied in the stable by appellants and the witness, and late in the afternoon was slaughtered and skinned by Curtis and Pinkham, and that Mrs. Atkinson assisted in dressing the carcass. Pinkham further testified that in the evening of the day the animal was killed he noticed the hide in the manger; that next morning it was gone and he observed that a pile of manure near the stable had been disturbed; that on the day following the killing of the animal appellants took half of the carcass to Twin Falls and, upon their return, Mrs. Atkinson told the witness she had spent nearly all of her share of the proceeds of the sale of the beef, amounting to \$15. Pinkham further testified that he was acquainted with the cattle belonging to appellants and that the animal slaughtered was not one of them; that his suspicions were aroused and on or about January 12, 1915, he reported the matter to the prosecuting attorney of Twin Falls county. A search of the Curtis premises was made on January 14, and resulted in the discovery, in the manure pile, of 19 pieces of hide and the feet of a cow brute, which Pinkham identified as being the hide and feet of the animal slaughtered by himself and appellants. Larson identified the hide as that of his cow, basing his identification upon the color, a portion of his brand found upon one piece of the hide, and

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a bobbed tail which was also found in the manure pile. Pinkham testified that after appellants were arrested he had a conversation with Mrs. Atkinson in which she asked him to repudiate certain statements he had made concerning the transaction and to lay the blame wholly upon Curtis.

Appellants introduced evidence contradictory of that produced by the state, tending to show that the cow which was killed belonged to them and that they knew nothing of the hide found in the manure pile. It was also shown that in the event of their conviction Pinkham expected to receive a reward of \$500 from the cattlemen's association.

It has been repeatedly held, and may be said to be the established rule in this state, that where sufficient evidence is introduced, if uncontradicted, to justify a conviction, a verdict and judgment based thereon will not be reversed because of conflict in the testimony. (*State v. Nesbit*, 4 Ida. 548, 43 Pac. 66; *State v. Silva*, 21 Ida. 247, 120 Pac. 835; *State v. Downing*, 23 Ida. 540, 130 Pac. 641; *State v. Hopkins*, 26 Ida. 741, 145 Pac. 1095; *State v. Bouchard*, 27 Ida. 500, 149 Pac. 464; *State v. Mox Mox*, 28 Ida. 176, 152 Pac. 802.)

While the record discloses that the animal slaughtered was first in possession of Curtis, and afterward of both the appellants, it also clearly appears that Mrs. Atkinson assisted in bringing it off the range, in butchering and disposing of it. They were in partnership in the stock business and she knew their cattle as well as he did. Appellants do not contend they were mistaken in the identity of the animal slaughtered, their defense is that it belonged not to Larson, but to themselves. Mrs. Atkinson's connection with the larceny is fully covered by sec. 6342, Rev. Codes, wherein it is provided:

"All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly committed the act constituting the offense or aided and abetted in its commission, . . . are principals in any crime so committed."

Whether she was directly responsible for the original taking or aided and abetted in it, she was properly charged and

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tried as a principal under the provisions of sec. 7697, Rev. Codes, which is as follows:

“The distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried and punished as principals, and no other facts need be alleged in any indictment against such an accessory than are required in an indictment against his principal.”

The action of the trial judge in giving certain instructions to the jury is assigned as error. The portions of the charge complained of will not be quoted here nor commented upon at length. Certain of the instructions given, and parts of others, taken alone, which are relied upon by appellants for a reversal, do not fully and correctly state the law, but read and construed in the light of the entire charge given to the jury they are not misleading and do not constitute prejudicial error.

All the instructions given in a case must be read and considered together and where, taken as a whole, they correctly state the law and are not inconsistent, but may be reasonably and fairly harmonized, it will be assumed that the jury gave due consideration to the whole charge and was not misled by an isolated portion thereof. (*Osborn v. Cary*, 28 Ida. 89, 152 Pac. 473; *Cady v. Keller*, 28 Ida. 368, 154 Pac. 629; *Taylor v. Lytle*, 29 Ida. 546, 160 Pac. 942; *State v. Curtis*, 29 Ida. 724, 161 Pac. 578.)

One of the assignments of error brings before us for review an exception taken by appellants to a portion of the argument of counsel for the state wherein the conversation between Pinkham and Mrs. Atkinson, after the arrest, was referred to as a confession. Whether or not her statements, on that occasion, amounted to an admission against interest, or confession, was a legitimate subject for argument and we cannot imagine that the jury was in any manner misled by the remarks of counsel.

Points Decided.

In support of their motion for a new trial appellants filed affidavits of newly discovered evidence, which, however, tend only to corroborate testimony produced by them at the trial. Where affidavits of newly discovered evidence are merely cumulative or corroborative of testimony introduced at the trial, the order of the court denying a motion for a new trial will not be reversed upon appeal. (*People v. Biles*, 2 Ida. (103) 114, 6 Pac. 120; *State v. Davis*, 6 Ida. 159, 53 Pac. 678.)

The judgment and order appealed from are affirmed.

Budge, C. J., and Rice, J., concur.

(June 29, 1917.)

CLIFFORD GRAVES, a Minor, by LEVI HATHAWAY,
His Guardian ad Litem, Respondent, v. THE NORTH-
ERN PACIFIC RAILWAY COMPANY, a Corporation,
Appellant.

[166 Pac. 571.]

RAILWAY CROSSINGS—NEGLIGENCE OF RAILWAY COMPANY—DUTY OF PER-
SON CROSSING—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

1. The failure of a railway company to comply with the provisions of sec. 2821, Rev. Codes, requiring such company to ring a bell, or sound a whistle, when approaching a place where the railroad crosses a street, road, or highway, constitutes negligence *per se*.

2. A railway corporation is liable for all damages, sustained by any person, caused by its locomotive, trains, or cars, where the provisions of sec. 2821, Rev. Codes, are not complied with, unless the person injured is guilty of contributory negligence.

3. It is the duty of a person crossing a railroad track to exercise such care as would be exercised by a man of ordinary prudence under like circumstances.

4. The presumption is that one, who is killed while attempting to cross a railroad track, was exercising due and proper care for his protection.

Argument for Appellant.

5. It is the duty of one about to cross a railroad track to look and listen, but it is not negligence *per se* to fail to stop, and where the facts are disputed the question of contributory negligence is one of fact, to be determined from all the facts and circumstances in evidence.

6. The evidence showed that deceased, who was driving an automobile stopped some distance from the crossing, went to the track, looked and listened; drove to within a few feet of the track, there stopping to look and listen; proceeded slowly, on the lookout for trains, and was not attempting to make the crossing ahead of the train. *Held*, sufficient to sustain a finding that deceased was using due care and was not guilty of contributory negligence.

7. Contributory negligence is an affirmative defense, the burden of establishing which, is on the defendant.

[As to duty of traveler, after looking both ways on approaching railroad track, to look again before crossing, see note in *Ann. Cas.* 1914A, 536.]

APPEAL from the District Court of the Eighth Judicial District, for Bonner County. Hon. John M. Flynn, Judge.

Action for damages for death of plaintiff's father and mother. Judgment for plaintiff. *Affirmed*.

Cannon & Ferris and Sidney H. Smith, for Appellant.

It is the duty of a person about to cross a railway track to stop, look and listen. (*Wheeler v. Oregon R. & N. Co.*, 16 Ida. 375, 102 Pac. 347.)

Failure to do so is negligence *per se*. (*Burrow v. Idaho etc. R. R.*, 24 Ida. 652, 135 Pac. 838.)

A railway company has the right to assume that the traveling public will look and listen for a passing train, and that having looked and listened they will discover the oncoming train and clear the track. (3 Elliott on Railroads, sec. 1095, p. 1648; *Hamilton v. Delaware etc. R. R. Co.*, 50 N. J. L. 263, 13 Atl. 29; *Omaha etc. Ry. Co. v. Talbot*, 48 Neb. 627, 67 N. W. 599; *Berry v. Pennsylvania R. Co.*, 48 N. J. L. 141, 4 Atl. 303; *Brommer v. Pennsylvania R. Co.*, 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A., N. S., 924.)

Argument for Appellant.

The track is itself a warning of danger and the traveler is in all cases under the duty to exercise proper precaution to inform himself as to the proximity of trains before attempting to cross. (3 Elliott on Railroads, 2d ed., sec. 1153, p. 311; *Müller v. Terre Haute etc. Ry. Co.*, 144 Ind. 323, 43 N. E. 257; *Jennings v. St. Louis etc. Ry. Co.*, 112 Mo. 268, 20 S. W. 490; *Chicago etc. R. R. Co. v. Huston*, 95 U. S. 697, 24 L. ed. 542; *Carlson v. Chicago etc. R. Co.*, 96 Minn. 504, 113 Am. St. 655, 105 N. W. 555, 4 L. R. A., N. S., 349; *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 90 Am. Dec. 761; *Northern Pac. Ry. Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. ed. 1014; *Elliott v. Chicago etc. R. Co.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. ed. 1068.)

The fact that the railway company violated statutes or ordinances is no excuse for negligence of party about to cross the track. (*Wheeler v. Oregon Ry. Co.*, *supra*; *Rumpel v. Oregon Short Line etc. R. Co.*, 4 Ida. 13, 26, 35 Pac. 700, 22 L. R. A. 725; *Hudson v. R. Co.*, 101 Mo. 14; *Lake Shore etc. R. Co. v. Pinchin*, 112 Ind. 592, 13 N. E. 677; *Reynolds v. Hindman*, 32 Iowa, 146; *Pennsylvania Co. v. Rathgeb*, 32 Ohio St. 66; *Krauss v. Walkill Valley R. Co.*, 69 Hun, 482, 23 N. Y. Supp. 432.)

Failure to sound bell or blow whistle does not abrogate the doctrine of contributory negligence nor does it give a right of action where the negligence of the plaintiff contributed to or was the proximate cause of the injury. (*Carlson v. Chicago Ry.*, 96 Minn. 504, 113 Am. St. 655, 105 N. W. 555, 4 L. R. A., N. S., 349; *Meeks v. Southern Pac. R. Co.*, 52 Cal. 602; *Green v. Southern Cal. R. Co.*, 138 Cal. 1, 70 Pac. 926; *Toledo etc. R. Co. v. O'Connor*, 77 Ill. 391; *Little Rock etc. Ry. Co. v. Wilson*, 90 Tenn. 271, 25 Am. St. 693, 16 S. W. 613, 13 L. R. A. 364; *Weber v. Kansas City Cable Ry. Co.*, 100 Mo. 194, 18 Am. St. 541, 12 S. W. 804, 13 S. W. 587, 7 L. R. A. 819; *Chicago etc. R. R. Co. v. Huston*, 95 U. S. 697, 24 L. ed. 542; *Chicago etc. R. Co. v. Bennett*, 181 Fed. 799, 104 C. C. A. 309.)

Argument for Appellant.

The duty of a traveler approaching a railroad track to exercise care to use his eyes and ears, and to prevent injury to himself, in order to avoid the imputation of negligence, is not excused by the failure of those in charge of an approaching train to give the proper and statutory signals. (*Griffith v. Baltimore etc. R. Co.*, 44 Fed. 574; *Louisville & N. R. Co. v. Crawford*, 89 Ala. 240, 8 So. 243; *Little Rock etc. Ry. Co. v. Cullen*, 54 Ark. 431, 16 S. W. 169; *Chicago etc. Ry. Co. v. Crisman*, 19 Colo. 30, 34 Pac. 286; *Chicago etc. R. Co. v. Lee*, 68 Ill. 576; *Müller v. Terre Haute etc. Ry. Co.*, 144 Ind. 323, 43 N. E. 257; *Sala v. Chicago etc. Ry. Co.*, 85 Iowa, 678, 52 N. W. 664; *Atchison R. Co. v. Townsend*, 39 Kan. 115, 17 Pac. 804; *Blackwell v. St. Louis etc. R. Co.*, 47 La. Ann. 268, 49 Am. St. 371, 16 So. 818; *Maryland Cent. R. Co. v. Neubeur*, 62 Md. 391; *Judson v. Great Northern Ry. Co.*, 63 Minn. 248, 65 N. W. 447; *Caldwell v. Kansas City etc. R. Co.*, 58 Mo. App. 453; *Müller v. New York Cent. etc. R. Co.*, 81 Hun, 152, 30 N. Y. Supp. 751; *Cleveland C. C. etc. R. Co. v. Elliott*, 28 Ohio St. 340; *Ormsbee v. Boston & P. R. Corp.*, 14 R. I. 102, 51 Am. Rep. 354.)

A party about to cross the track must stop, look and listen at a point where it will be effective. (*Brommer v. Pennsylvania R. Co.*, 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A., N. S., 924; *New York Cent. etc. R. R. Co. v. Maidment*, 168 Fed. 23, 93 C. C. A. 413, 21 L. R. A., N. S., 794; *Kelsay v. Missouri Pac. Ry. Co.*, 129 Mo. 362, 30 S. W. 339; *Ladouceur v. Northern Pac. R. Co.*, 4 Wash. 38, 29 Pac. 942; *Brown v. Milwaukee & St. P. Ry. Co.*, 22 Minn. 165; *Abbett v. Chicago etc. Ry. Co.*, 30 Minn. 482, 16 N. W. 266; *Nelson v. Duluth etc. Ry. Co.*, 88 Wis. 392, 60 N. W. 703; *Blackburn v. Southern Pac. Co.*, 34 Or. 215, 55 Pac. 225; 3 Elliott on Railroads, sec. 1166, p. 1775; *Owens v. Pennsylvania R. Co.*, 41 Fed. 187.)

The fact that the crossing is dangerous requires, as a matter of law, a higher degree of care on the party crossing. (*Chicago etc. R. Co. v. Andrews*, 130 Fed. 65, 64 C. C. A. 399; *Butterfield v. Western R. Corp.*, 10 Allen (92 Mass.), 532, 87

Argument for Respondent.

Am. Dec. 678; *Fletcher v. Fitchburg R. Co.*, 149 Mass. 127, 21 N. E. 302, 3 L. R. A. 743.)

Obstructions rendering the view obscure and unreliable call for greater caution. (*Beyel v. Newport News etc. R. Co.*, 34 W. Va. 538, 12 S. E. 532; *Kinter v. Pennsylvania R. Co.*, 204 Pa. 497, 93 Am. St. 795, 54 Atl. 276; *Mankewicz v. Lehigh Valley Ry. Co.*, 214 Pa. 386, 63 Atl. 604; *Railroad Co. v. Smalley*, 61 N. J. L. 277, 39 Atl. 695; *Cleveland etc. Ry. Co. v. Wuest*, 41 Ind. App. 210, 83 N. E. 620, 40 Ind. App. 693, 82 N. E. 986; *Shumms' Admx. v. Rutland R. R. Co.*, 81 Vt. 186, 69 Atl. 945, 19 L. R. A., N. S., 973; *McKinney v. Port Townsend etc. Ry.*, 91 Wash. 387, 158 Pac. 107.) The judgments are grossly excessive. (*Beaton v. City of St. Maries*, 27 Ida. 638, 151 Pac. 996.)

F. C. Robertson, Robert Corkery and Allen P. Asher, for Respondent.

The failure to observe the statutory regulations renders the defendant liable for any damages sustained. (*Wheeler v. Oregon R. & N. Co.*, 16 Ida. 375, 102 Pac. 347.)

Deceased used due care for their own safety and stopped, looked and listened. (*Burrow v. Idaho & Wash. Nor. R. R. Co.*, 24 Ida. 652, 135 Pac. 838; *Fleenor v. Oregon Short Line Ry. Co.*, 16 Ida. 781, 102 Pac. 897.)

The deceased being strangers, were not absolutely charged to look at the best available point. (*Emens v. Lehigh Valley R. Co.*, 223 Fed. 810; *Rodrian v. New York etc. Ry.*, 125 N. Y. 526, 26 N. E. 741; *Baltimore & Ohio R. Co. v. Griffith*, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. ed. 274; *Continental Improvement Co. v. Stead*, 95 U. S. 161, 24 L. ed. 403.)

The burden was on the defendant to show that deceased did not look or listen and it is presumed that they did look and listen. (*Texas & Pac. R. Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. ed. 186; *Baltimore & P. R. Co. v. Landri-gan*, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. ed. 262.)

Amount of recovery is very conservative considering ages of parents and earning capacity of father. (*Anderson v.*

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Great Northern Ry. Co., 15 Ida. 513, 522, 99 Pac. 91; *Ruppel v. United Railroads*, 1 Cal. App. 666, 82 Pac. 1073; *Staab v. Rocky Mountain Bell Tel. Co.*, 23 Ida. 314, 129 Pac. 1078; *Bourdier v. Louisiana Western Ry. Co.*, 133 La. 50, 62 So. 348; *Rochester v. Seattle, Renton & Southern Ry.*, 67 Wash. 545, 122 Pac. 23; *Wallace v. Third Ave. Ry. Co.*, 36 App. Div. 57, 55 N. Y. Supp. 132; *Demarest v. Little*, 47 N. J. L. 28; *Dimmey v. Wheeling etc. R.*, 27 W. Va. 32, 55 Am. Rep. 292.)

BUDGE, C. J.—Two actions were brought by the respondent, Clifford Graves, a minor, against the appellant; one for the death of his father, Minor Graves, the other for the death of his mother, Clara M. Graves, occasioned while the deceased were in the act of crossing appellant's railroad track, in an automobile, at Cocolalla. The cases were tried together, a jury being waived. The court rendered findings and judgment in favor of respondent, awarding him \$8,500 for the death of his father, and \$3,500 for the death of his mother. From these judgments and from an order overruling appellant's motion for a new trial in each case these appeals have been taken.

The cases were consolidated for argument and inasmuch as, in our view, they should be decided upon the same principle, we will deal with both of them in one opinion.

The court found that the crossing at which the accident occurred was a public crossing, much used and frequently traveled and was situated about 250 feet west of Cocolalla station; that between the crossing and station appellant carelessly and negligently maintained on its right of way numerous small buildings, sheds and outhouses and permitted trees, shrubbery, bushes, debris and other obstructions to stand there, which so obstructed the view of those who approached the crossing from the direction from which the deceased were traveling that a train approaching from the direction from which appellant's train was coming, at the time of the accident, could not be seen by one traveling along the highway until within a very short distance of the tracks, except at one or two points where a view of the tracks was

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possible for a short distance; that on October 30, 1915, the parents of respondent were passing through Cocolalla in an automobile and as they attempted to cross the railroad track one of appellant's transcontinental trains, advancing at the rate of 45 miles an hour, bore down upon them from the direction of the station, wrecked their machine and killed them; that appellant failed to keep a sufficient lookout, failed to ring a bell or to give the customary crossing whistle, two long blasts, but gave only one blast, the ordinary station whistle; that the deceased were using due care and were driving at the rate of only eight miles an hour at the time of the collision.

Sec. 2821, Rev. Codes, provides: "A bell of at least twenty pounds weight must be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road or highway, and be kept ringing until it has crossed such street, road, or highway; or a steam whistle must be attached, and be sounded, except in cities, at the like distance, and be kept sounding at intervals until it has crossed the same. . . . The corporation is also liable for all damages sustained by any person, and caused by its locomotives, trains, or cars, when the provisions of this section are not complied with."

That the provisions of this section were not complied with was found by the court, and the finding in respect thereto is amply sustained by the evidence. The failure to comply with this statute constituted negligence *per se*. This being true it was incumbent upon appellant to show contributory negligence on the part of deceased, in order to relieve itself of liability, which they attempted to do but the record does not bear out this contention. The finding of the court in regard to the dangerous character of the crossing, and the high rate of speed with which appellant was operating its train, is likewise sustained by the evidence. The trial court also found that the deceased at the time of crossing appellant's railway track were exercising such care and caution, in order to avoid being struck by one of appellant's trains, as a reasonably prudent person would exercise under like circumstances; that they looked and listened but did not see or hear the train

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approaching; and that the automobile was under control at the time of the collision. Which findings we think are fully supported by the evidence.

The presumption is that one who is killed while attempting to cross a railroad track was exercising due and proper care for his protection. (*Fleenor v. Oregon Short Line R. Co.*, 16 Ida. 781, 102 Pac. 897.) In general it is said to be the duty of a person crossing a railroad track to exercise such care as would be exercised by a man of ordinary prudence under like circumstances. (33 Cyc. 981.) Some courts hold, however, that an ordinarily prudent man, as a matter of law, would stop, look and listen immediately before crossing the track, and that such would be his absolute duty.

There is a conflict in the testimony as to just how close to the track it was necessary to come in order to obtain an unobstructed view of approaching trains. The distance was placed at from 6 to 13 feet. Appellant contends, that regardless of the exact distance of this viewpoint from the track, it was an absolute duty, incumbent upon the deceased, to stop, look and listen between such point and the track, and that their failure to do so was contributory negligence. By the weight of authority, however, it is not negligence *per se* to fail to stop, but much depends upon the circumstances of each case. (33 Cyc. 1011, notes 34, 36; *Hopkins v. Utah Northern Ry. Co.*, 2 Ida. (277), 300, 13 Pac. 343; *Fleenor v. Oregon Short Line R. R. Co.*, *supra*; *Louisiana & A. Ry. Co. v. Ratcliffe*, 88 Ark. 524, 115 S. W. 396; *Chesapeake & O. Ry. Co. v. Patrick*, 135 Ky. 506, 122 S. W. 820; *Pittsburgh C. C. & St. L. Ry. Co. v. Dove*, 184 Ind. 447, 111 N. E. 609; *Cleveland C. C. & St. L. Ry. Co. v. Lynn*, 177 Ind. 311, 95 N. E. 577, 98 N. E. 67; *Hull v. Seattle etc. Ry. Co.*, 60 Wash. 162, 110 Pac. 804; *Chicago etc. Ry. Co. v. Baroni*, 32 Okl. 540, 122 Pac. 926; *Emens v. Lehigh Valley R. Co.*, 223 Fed. 810; *Pennsylvania R. Co. v. Cash*, 200 Fed. 337, 118 C. C. A. 443; *Mississippi Cent. R. Co. v. Hanna*, 98 Miss. 609, 54 So. 74; *Wise v. Delaware L. & W. R. Co.*, 81 N. J. L. 397, Ann. Cas. 1914D, 1071, 80 Atl. 459; *Smith v. St. Louis Southwestern Ry. Co.*, 150 Mo. App. 1, 129 S. W. 719.)

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We do not think that this court, in the case of *Wheeler v. Oregon R. & N. etc. Co.*, 16 Ida. 375, 102 Pac. 347, attempted to enunciate a rule that the duty to stop is absolutely essential, for the reason that it was said by the court in that case: "If the facts are disputed and from them reasonable and prudent men might disagree as to negligence, then the question of negligence becomes a question of fact, and under proper instructions must be submitted to the jury."

There is no arbitrary rule as to when or where the traveler must stop, look and listen. (33 Cyc. 1012, note 39; *Cleveland C. C. & St. L. Ry. Co. v. Lynn*, *supra*; *Pittsburgh C. C. & St. L. Ry. Co. v. Dove*, *supra*; *Virgin v. Lake Erie & W. R. Co.*, 55 Ind. App. 216, 101 N. E. 500; *Giddings v. Chicago R. I. & P. Ry. Co.*, 133 Mo. App. 610, 113 S. W. 678.)

The record shows that the respondent's father left his automobile at the store, which was about 180 feet from the crossing, and walked to the railroad track, looked in both directions for trains, and seeing none came back to his automobile, in which he slowly proceeded along the highway to a point near the railroad crossing, where he stopped, but being unable to see the approaching train because of the obstructions which the company had maintained and permitted to remain between the crossing and the station, again proceeded slowly, with the machine under control, until he reached the crossing where the collision occurred. Whether or not deceased stopped their engine immediately at the track is immaterial under the facts of this case. There was no warning given by the approaching train. A strong wind was blowing toward the train and away from deceased. Numerous witnesses standing at a comparatively short distance, testified that they did not hear the crossing whistle nor the ringing of the bell. We do not agree with appellant's contention that the failure of the deceased to again stop their automobile, kill their engine, get out of their car a second time and look up and down the track, constituted contributory negligence. It would have been the duty of the deceased, had there been no obstructions, to have looked up and down the track before driving upon it. True, if deceased had waited at the bridge until the train

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had passed the accident would have been avoided. But they had taken every reasonable precaution to ascertain the danger, without avail. They were proceeding slowly, were on the lookout for trains, and were not attempting to make the crossing ahead of the train. Every fact and circumstance in evidence negatives contributory negligence on the part of deceased, which is more than the law requires. (Sec. 4221, Rev. Codes.)

The death of respondent's parents resulted from the negligent and careless act of the agents and employees of the appellant railroad company, not only in the operation and management of its train, but also in the construction and maintenance of the buildings and other obstructions upon its right of way, between the public highway and its railroad station, which shut off the view of approaching trains and prevented the deceased from seeing or knowing at what time the trains would pass the crossing over which they attempted to drive the automobile.

The father's age, at the time of his death, was about 30 years, and he was earning from \$150 to \$200 a month; the mother's age was 27 years. The judgments were not excessive and they are affirmed. Costs awarded to respondent.

Morgan and Rice, JJ., concur.

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(June 29, 1917.)

WM. E. CAMPBELL, Respondent, v. THE BANK AND
TRUST COMPANY, a Corporation, Appellant.

[166 Pac. 258.]

**MALICIOUS PROSECUTION—TERMINATION—COMPROMISE OR AGREEMENT OF
PARTIES.**

An action for damages for malicious prosecution cannot be maintained where it appears that the criminal case, which forms its basis, was terminated by dismissal, without hearing, by procurement of the party prosecuted, or as the result of a compromise.

[As to determination of proceeding by compromise as termination sufficient to support action for malicious prosecution, see note in *Ann. Cas.* 1915D, 1164.]

APPEAL from the District Court of the Second Judicial District, for Lewis County. Hon. Edgar C. Steele, Judge.

Action for damages for malicious prosecution. Judgment for plaintiff. *Reversed.*

James E. Babb and Perry W. Mitchell, for Appellant.

C. T. McDonald, J. S. McDonald and S. O. Tannahill, for Respondent.

Counsel cite no authorities on point decided.

MORGAN, J.—Respondent was the owner of certain livestock in Lewis county which he mortgaged to appellant. After the mortgage had been filed in the office of the county recorder respondent removed the property to Nez Perce county. Appellant thereupon procured his arrest pursuant to the provisions of sec. 7100, Rev. Codes, which provides: "Every mortgagor of property . . . who, while such mortgage remains unsatisfied in whole or in part, wilfully removes from the county or counties where such mortgage is recorded,

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... the property, or any part thereof, without the consent of the holder of the mortgage, is guilty of larceny.”

This action was commenced by respondent against appellant to recover damages for malicious prosecution of the criminal case above mentioned. At the close of the testimony upon the part of both parties appellant moved for a nonsuit, also for an instruction to the jury to render a verdict for the defendant. These motions were denied and a verdict was rendered in respondent's favor upon which judgment was entered, from which, and from an order overruling a motion for a new trial, this appeal was taken.

It appears from the record that the criminal complaint was signed by Arthur E. Clark, president of appellant corporation, and that he did so, largely, upon information received from S. D. White, who was acting as appellant's agent in the matter. It further appears that after respondent had been arrested and taken to jail some negotiations were entered into between himself and White looking to a settlement of his indebtedness to the bank, payment of which was secured by mortgage on the chattels above mentioned and upon certain real estate belonging to him. The culmination of these negotiations was that he turned over a portion of the personal property and deeded the real estate to appellant, whereupon the criminal charge was dismissed by the magistrate at respondent's request, he paying the costs, and he was released from custody.

With respect to the settlement, the dismissal of the criminal complaint and his discharge from custody, respondent testified, upon his direct examination, in part, as follows:

“Q. You say you saw this man White, did you have a conversation with him at the jail? A. He done most of the conversation himself.

“Q. He talked to you did he? A. He seemed to lead Rice and me to Babb's office and on the way down there he told me all the big things he was going to do, going to foreclose, going to send me to the penitentiary, and going to cost me everything, but if you will sign over this half section of land and let me help myself to the horses and mules we will turn

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you loose and not appear against you, be nothing to it. . . . He says you just sign over the land and we will help ourselves to the horses and mules and it will be all right, and we will dismiss it.

“Q. What did he say he would do if you didn’t sign over the deed and bill of sale? A. They would send me to the penitentiary and foreclose on my land. . . .

“Q. Did you sign the deeds? A. Yes, sir. . . .

“Q. What if anything did Mr. Erb, the justice of the peace, do relative to you? A. Well he called up Mr. Hodge [prosecuting attorney] and said that the prosecuting witness was satisfied and I guess the case will be dismissed, and he said somebody has got to pay the costs of this thing, and I told him it was a hell of a note to put a man in jail and take his property away from him and make him pay his way out, so the costs was taxed up to me, \$13.20, or whatever it was and I paid it and was released after it was all over.”

Upon cross-examination respondent further testified:

“Q. Now on the 10th day of August, 1912, when you made the bill of sale to them for a part of that chattel mortgage property and the deeds for the land you made those transfers in satisfaction of the amount that was due on that mortgage, the \$3,000 note, \$2,850 note, and all interest and all future advances that had been made under it did you not? A. I remember of making out some deeds to get out of jail and so forth but—

“Q. Those were turned over in satisfaction of that indebtedness? A. To avoid prosecution and satisfy Mr. Clark.

“Q. To satisfy that indebtedness? A. Yes, sir.”

It further appears that Mr. White presented himself at the office of the justice of the peace, at the time the preliminary examination was to have been held and at which time the case was dismissed, and offered to testify upon behalf of the prosecution, but it does not appear that either he or appellant otherwise insisted upon going forward with the case.

This is not such a termination of the criminal case as will sustain this action.

Points Decided.

"Where the termination of a prosecution has been brought about by the procurement of the defendant, or by a compromise or agreement of the parties, an action for malicious prosecution cannot be maintained." (*Wickstrom v. Swanson*, 107 Minn. 482, 120 N. W. 1090; 26 Cyc. 58; *Langford v. Boston & A. R. Co.*, 144 Mass. 431, 11 N. E. 697; *Emery v. Ginnan*, 24 Ill. App. 65; *Singer Sewing Machine Co. v. Dyer*, 156 Ky. 156, 160 S. W. 917; *Waters v. Winn*, 142 Ga. 138, Ann. Cas. 1915D, 1067, 82 S. E. 537, L. R. A., 1915A, 601.)

The judgment is reversed with direction to the trial court to dismiss the action. Costs are awarded to appellant.

Budge, C. J., and Rice, J., concur.

(June 29, 1917.)

ST. REGIS LUMBER COMPANY, a Corporation, Respondent, v. THE TURNER LUMBER & MANUFACTURING COMPANY, LIMITED, a Corporation, Appellant.

[166 Pac. 254.]

CONTRACT OF SALE — BREACH BY VENDEE — DAMAGES — NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

1. Where, under the provisions of a contract of sale, the goods are to be manufactured by the vendor, the measure of damage for a breach of the contract by the vendee is the difference between the contract price and the cost of manufacture and delivery.

2. The action of the trial court in denying a motion for a new trial on the ground of newly discovered evidence is not error when the affidavits, filed in support thereof, disclose that such evidence relates to matters not embraced within the issues or is cumulative to that introduced at the trial.

[As to measure of damages for breach of executory contract, see note in 42 Am. Dec. 48.]

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. William W. Woods, Judge.

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Action for breach of contract. Judgment for plaintiff.
Affirmed.

James A. Wayne, for Appellant, cites no authorities.

Charles E. Miller, for Respondent.

"An appellate court will not disturb the judgment of a trial court, because of conflict in the evidence where there is sufficient proof, if uncontradicted, to sustain it." (*Darry v. Cox*, 28 Ida. 519, 155 Pac. 660; *Jensen v. Bumgarner*, 28 Ida. 706, 156 Pac. 114; *Jones v. Vanausdeln*, 28 Ida. 743, 156 Pac. 615; *Wolf v. Eagleson*, 29 Ida. 177, 157 Pac. 1122; *Little v. Little*, 29 Ida. 292, 158 Pac. 559.)

Where profits are sufficiently certain, or where they were in contemplation of the parties when making the contract, or where by evidence they may be shown with reasonable certainty and their loss results from defendant's breach of contract, they may be allowed against him. (14 M. A. L. 30; *Allison v. Chandler*, 11 Mich. 542; *Chapman v. Kirby*, 49 Ill. 211; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Dennis v. Maxfield*, 10 Allen (92 Mass.), 138; *Dibol v. Minott*, 9 Iowa, 403; *Brown v. Hadley*, 43 Kan. 267, 23 Pac. 492; *Lee v. Briggs*, 99 Mich. 487, 58 N. W. 477; *Cincinnati S. L. Gas Co. v. Western S. L. Co.*, 152 U. S. 200, 14 Sup. Ct. 523, 38 L. ed. 411; *Anvil Mining Co. v. Humble*, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. ed. 814; *Skagit Railway & Lbr. Co. v. Cole*, 2 Wash. 57, 25 Pac. 1077; *Federal I. & B. Bed. Co. v. Hock*, 42 Wash. 668, 85 Pac. 418.)

MORGAN, J.—This action was commenced to recover for an alleged breach of a written contract wherein it was provided, among other things, that respondent should saw and deliver to appellant one million feet of spruce lagging, to be cut in such dimensions as the latter might indicate, at the price of \$10 per thousand feet.

Respondent introduced evidence to prove that on or about August 19, 1914, after it had delivered 621,344 feet of lag-

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ging, appellant refused to order or to indicate the dimensions of any more and that by such refusal it has been damaged in the sum of \$1,135.96, which sum is an estimated profit of \$3 per thousand upon the 378,656 feet remaining undelivered. A jury was waived and the court made findings and rendered judgment in respondent's favor for \$1,135.07. Appellant moved for a new trial, which was denied, and it has appealed from the judgment and from the order denying its motion for a new trial.

Appellant contends that it was the understanding of the parties that the delivery of the lagging was to be made at such times as it found a market for the same at the mines in the Coeur d'Alene mining district. This is disputed by respondent and certainly nothing contained in the contract can be construed to be an expression of such an agreement. Upon the contrary, that document provides, with respect to the delivery of the timber, as follows: "Said lagging to be cut in lengths and dimensions designated by the party of the second part (appellant), and to be shipped as sawed by the party of the first part (respondent)." The finding of the trial court that appellant committed a breach of the contract by its refusal to order the lagging and indicate the dimensions into which it should be cut is fully sustained by the evidence.

The contract also provides that during the time of its existence respondent should sell no lagging in the Coeur d'Alene mining district and, appellant contends, this provision was violated. There is conflict in the testimony upon this point, but the evidence is ample to sustain the finding of the trial court that no breach of the contract was committed by respondent.

Appellant contends that respondent found a market for its lagging in an amount equal to, or in excess of, the contract price and that it, therefore, suffered no damage by reason of the breach of the contract, if a breach occurred.

The record discloses that by reason of appellant's refusal to designate the dimensions into which the lagging should be cut and to give orders for its shipment, respondent was forced to shut down its mill from August 20th to December 1, 1914.

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The evidence does not show, and it is not fair to indulge the presumption, that had appellant not breached the contract respondent would have been unable to find a market for its product after the terms thereof had been fully complied with.

As a general rule the measure of damage in case of breach by the vendee of a contract of sale is the difference between the contract price and the market value of the property, but where goods are produced and manufactured by the vendor, the measure of damage is the difference between the contract price and the cost of manufacture and delivery. (*American Bridge & Contract Co. v. Bullen Bridge Co.*, 29 Or. 549, 46 Pac. 138; *Upstone v. Weir*, 54 Cal. 124; *Hale v. Trout*, 35 Cal. 229; *Ahlers v. Smiley*, 163 Cal. 200, 124 Pac. 827; 35 Cyc. 595.)

Respondent produced evidence showing the cost of production and delivery of lagging and that the contract price was \$3 per thousand feet in excess of such cost. The trial court found accordingly and in so doing adopted the correct measure of damage.

In support of the motion for a new trial certain affidavits were filed showing newly discovered evidence which could be produced upon behalf of appellant. This evidence would be largely cumulative and the rule is well established that its discovery is not ground for a new trial. The affidavits further disclose that evidence has been discovered since the trial tending to show that a provision in the contract to the effect that the lagging in question should be of a grade and quality that would be accepted by the mine owners of the Coeur d'Alene mining district had not been conformed to by respondent and that an inferior grade, which such mine owners would not accept, had been furnished.

It is alleged in the fourth paragraph of the first cause of action, stated in the complaint, that between the date of the execution of the contract and September 1, 1914, respondent sawed and delivered to appellant 621,344 feet of spruce lagging of the quality required under said contract, and paragraph four of the answer is as follows: "Defendant admits the allegations contained in paragraph four of plaintiff's first

Points Decided.

cause of action." The matter offered to be proved relative to the quality of the lagging, in the event a new trial was granted, was not responsive to any issue framed by the pleadings, and the motion for a new trial was properly denied.

The judgment is affirmed. Costs are awarded to respondent.

Budge, C. J., and Rice, J., concur.

(June 29, 1917.)

THE MOUNTAIN HOME LUMBER COMPANY, LTD., a Corporation, Appellant, v. D. R. SWARTWOUT, Appellant, and ALMA LORENE MESEROLE, Formerly ALMA LORENE SMITH, E. D. MESEROLE and CLARA LUDELL SMITH, Respondents.

[166 Pac. 271.]

AGENCY—EXECUTION SALE—NOTICE OF EXISTING EQUITIES—BONA FIDE PURCHASER—LACK OF CONSIDERATION—AFTER-ACQUIRED TITLE—ESTOPPEL.

1. A purchaser at an execution sale of realty, who takes the property with actual notice that the judgment debtor had given both a bond for a deed and a deed for the property to a third party before the lien of the judgment attached, is not a *bona fide* purchaser.

2. A purchaser at an execution sale of realty who takes the property with constructive notice that a judgment prior to the one under which he purchases had impressed such property with a prior lien, is not a *bona fide* purchaser.

3. Where a judgment creditor bids in property of the judgment debtor, at an execution sale, and credits upon the judgment the amount bid, no valuable consideration passes for such purchase, since it amounts to nothing more than a cancellation, *pro tanto*, of a pre-existing indebtedness, and such purchase conveys only the legal title to the judgment creditor, subject to existing equities.

4. One who parts with a consideration neither valuable nor irrevocable is not a *bona fide* purchaser.

Argument for Appellant.

5. Where one acting as secretary, general manager and agent of a corporation dealing in land, with full authority to make conveyances on behalf of such corporation, induces a prospective purchaser to buy a tract of land which he represents as belonging to the corporation, when in fact it does not so belong, and on behalf of the corporation gives the purchaser a deed for the land, and thereafter acquires title to the land himself, both he and his successors in interest are estopped from asserting title to the land as against such purchaser.

6. G., as agent of a corporation, conveyed to S. land which he represented as belonging to the corporation, but which in fact did not so belong. Afterward G. acquired title for himself without the knowledge of S. *Held*, that such title as G. acquired became impressed with a trust for the benefit of S., and when G.'s supposed interest was subsequently purchased on execution sale by a judgment creditor of G., such purchaser took only such title and interest as G. had, and must also be deemed to have taken the legal title in trust for S., subject to every element of estoppel that could be urged against G.

[As to defenses available to defendant in execution when sued in ejectment by purchaser thereunder, see note in 84 Am. Dec. 570.]

APPEAL from the District Court of the Fourth Judicial District, for Elmore County. Hon. Chas. O. Stockslager, Judge.

Action to quiet title. Judgment for defendants and cross-plaintiffs, Meserole and Smith. *Reversed*.

J. R. Smead, Elliott & Healy, for Appellant Swartwout.

"A person who acquires a legal title or an equitable title or interest in a given subject matter, even for a valuable consideration, but with notice that the subject matter is already affected by an equity or equitable claim in favor of another, takes it subject to that equity. (1 Pomeroy's Eq. Jur., 3d ed., sec. 591, p. 964.)

Although one claimant holds the legal title, yet if at the time of his purchase he was charged with notice of an existing equitable right in the land, such notice gives the earlier equitable right priority over the legal title. (2 Pomeroy's Jur., sec. 681.)

Argument for Appellant.

Nor is it important whether the notice to one about to purchase the legal title to land is actual or constructive. (2 Pomeroy's Eq. Jur., sec. 690.)

Two equities are equal when both parties are equally entitled to the consideration and protection of a court of equity. In such a case the earlier equity prevails over the later. (2 Pomeroy's Eq. Jur., sec. 683, p. 1189.) An agent making false representations as to his principal's title to real estate is estopped thereafter to assert any title inconsistent with his representations. (2 Pomeroy's Eq. Jur., sec. 807; *Crosby v. Meeks*, 108 Ga. 126, 33 S. E. 913; *Eastwood v. Standard Mines & Mill Co.*, 11 Ida. 195, 81 Pac. 382.)

Where a person induces another to purchase property, representing to him that it is free from encumbrance, such person will be estopped afterward to claim under a mortgage or judgment lien existing at the time of his false representations, and subsequently purchased by him. (16 Cyc. 784; *Briggs v. Langford*, 59 Hun, 615, 12 N. Y. Supp. 657; *Bitting's Appeal*, 17 Pa. St. 211; 15 Am. & Eng. Ency. Law, 2d ed., 1184; *Central Coal & Iron Co. v. Walker's Excr.*, 24 Ky. Law Rep. 2191, 73 S. W. 778.)

One who, in a representative capacity, assumes to sell and convey to another the entire estate in land, is estopped, as against the purchaser, from asserting an estate in his own right in the same land; although the first sale and deed were void. (*Wells v. Steckelberg*, 52 Neb. 597, 66 Am. St. 529, 32 N. W. 865; *Carothers v. Alexander*, 74 Tex. 309, 328, 12 S. W. 4.)

The estoppel runs against the guilty party and against those in privity with him, if such privies have either form of notice, or knowledge. (16 Cyc. 798; 11 Am. & Eng. Ency. 415 (3); *Tefft v. Munson*, 57 N. Y. 97, 99.)

By crediting the amount of its bid upon its own judgment, plaintiff merely canceled to that extent a pre-existing indebtedness, and one which could be revived if title to the land should prove defective. Such a transaction does not furnish a valuable consideration. (*Land v. Hea*, 20 Ida. 250, 118 Pac. 506; *Holden v. Garrett*, 23 Kan. 98; *Ayres v. Duprey*,

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27 Tex. 593, 86 Am. Dec. 657; *Dickerson v. Tillinghast*, 4 Paige Ch. (N. Y.) 215, 25 Am. Dec. 528; *Wright v. Douglass*, 10 Barb. (N. Y.) 27; *Williams v. Hollingsworth*, 1 Strob. Eq. (S. C.) 103, 47 Am. Dec. 527.)

Defendant Smith purchased with both notice and knowledge of the estoppel against Garrett. This also estops her to deny Swartwout's claim. (Tiffany, Real Property, sec. 457; *Froman v. Madden*, 13 Ida. 138, 88 Pac. 894.) The actual notice and knowledge had by both plaintiff company and defendant Smith is sufficient to defeat their claims. (21 Am. & Eng. Ency., 584-590; *Wood v. Rayburn*, 18 Or. 3, 17, 22 Pac. 521; *Mull v. Orme*, 67 Ind. 95.)

W. L. Harvey and W. C. Howie, for Appellant Mt. Home Lbr. Co.

The courts universally hold that where title or interest of the party sought to be estopped is a matter of record there could be no estoppel. (*Campbell v. Jacobson*, 145 Ill. 389, 34 N. E. 39; *Gardner v. Pierce*, 22 Nev. 146, 36 Pac. 782; *Blue Ridge Marble Co. v. Duffy*, 128 Ind. 79, 27 N. E. 430; *Porter v. Wheeler*, 105 Ala. 451, 17 So. 221; *Griswold v. Boley*, 1 Mont. 545; *Cornish v. Woolverton*, 32 Mont. 456, 108 Am. St. 598, 81 Pac. 4; *Murphy v. Jackson*, 69 Miss. 403, 13 So. 728; *Waits v. Moore*, 89 Ark. 19, 115 S. W. 931; *Geisendorff v. Cobbs*, 47 Ind. App. 573, 94 N. E. 236; *Oberheim v. Reeside*, 116 Md. 265, 81 Atl. 590; *Brant v. Va. Coal and Iron Co.*, 93 U. S. 326, 23 L. ed. 927.)

"To enable a man to set up a title by estoppel, he must have been ignorant of the true state of the title at the time he took it, or been without means of ascertaining it by a reference to records." (16 Cyc. 738-741; 3 Washburn, Real Property, 81.)

As a rule the doctrine of title by estoppel does not apply in the absence of personal covenants to a title subsequently acquired in a different right. (16 Cyc. 712; *Smith v. Penny*, 44 Cal. 161; *Davis v. Davis*, 26 Cal. 23, 85 Am. Dec. 157.)

Argument for Respondents.

One making a conveyance in a representative capacity where there is nothing in the conveyance to indicate a purpose to bind himself individually, is not estopped from setting up an adverse title held by him at the time of conveyance. (*Wm. D. Cleveland & Sons v. Smith* (Tex. Civ. App.), 113 S. W. 547; *Dean v. Parker*, 88 Cal. 283, 26 Pac. 91; *Gjerstadengen v. Van Duzen*, 7 N. D. 612, 66 Am. St. 679, 76 N. W. 233; *Gjerstadengen v. Hartzell*, 9 N. D. 268, 81 Am. St. 575, 83 N. W. 230; *Spears v. Weddington*, 146 Ky. 434, 142 S. W. 679.)

Nor is he estopped from setting up an adverse after-acquired title. (*Flemming v. Ray*, 86 Ga. 533, 12 S. E. 944; *Consolidated Rep. Min. Co. v. Lebanon Min. Co.*, 9 Colo. 343, 12 Pac. 212; *Jackson v. Hoffman*, 9 Cow. (N. Y.) 271; *Irish v. Stevens*, 154 Iowa, 286, 134 N. W. 634.)

Anyone purchasing at an execution sale, including the debtor, who may credit the payment on his judgment is a *bona fide* purchaser. (*Pugh v. Highley*, 152 Ind. 252, 71 Am. St. 327, 53 N. E. 171, 44 L. R. A. 392; *Sternberger v. Ragland*, 57 Ohio St. 148, 48 N. E. 811; *Conley v. Redwine*, 109 Ga. 640, 77 Am. St. 398, 35 S. E. 92; *Hart v. Gardner*, 81 Miss. 650, 33 So. 442, 497; *Sharp v. Shea*, 32 N. J. Eq. 65; *Newman v. Davis*, 24 Fed. 609; *Low v. Blinco*, 10 Bush (73 Ky.), 331; *Smith v. Farmers & Merchants' Nat. Bank*, 57 Or. 82, 110 Pac. 410; *Feinberg v. Stearns*, 56 Fla. 279, 131 Am. St. 119, 47 So. 797; *Hendryx v. Evans*, 120 Iowa, 310, 94 N. W. 853; *Wood v. Morehouse*, 45 N. Y. 368; *Motley v. Jones*, 98 Ala. 443, 13 So. 782; *McMurtie v. Riddell*, 9 Colo. 497, 13 Pac. 181.)

The record of their deed and contract cannot be actual notice nor constructive notice to plaintiff for the reason that they are both from a party who is absolutely a stranger to the chain of title. (*Harris v. Reed*, 21 Ida. 364, 121 Pac. 780; 2 Pomeroy's Eq. Jur., sec. 658.)

E. M. Wolfe, for Respondents Smith.

Respondents Smith have the right to assume that the Great Western Beet Sugar Co. is a stranger to the title. That

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though it executed a deed to the property it had no title to convey and that deed conveyed no title. For this reason of course, Swartwout obtained no title. They had no right to believe that the company intended to convey to Swartwout the property described in the instrument, since no person is supposed to convey property to which he has no title. The Smiths, therefore, were justified in buying at the sheriff's sale the title, which appeared of record to be in John H. Garrett, the defendant in the suit in which the sale was being made. (*Harris v. Reed*, 21 Ida. 364, 121 Pac. 780.)

A purchaser at a sheriff's sale is practically the same as a purchaser from the owner and is as fully protected. (*Riley v. Martinelli*, 97 Cal. 575, 33 Am. St. 209, 32 Pac. 579, 21 L. R. A. 33; *Johnson v. Equitable Securities Co.*, 114 Ga. 604, 40 S. E. 787, 56 L. R. A. 933; *De Lany v. Knapp*, 111 Cal. 165, 52 Am. St. 160, 43 Pac. 598; *Pugh v. Highley*, 152 Ind. 252, 71 Am. St. 327, 53 N. E. 171, 44 L. R. A. 392.)

Even though Garrett might be estopped, a purchaser at execution sale would not be estopped unless the record disclosed want of title in Garrett. (*Equitable Loan & Security Co. v. Lewman*, 124 Ga. 190, 52 S. E. 599, 3 L. R. A., N. S., 879.)

BUDGE, C. J.—This is an action to quiet title, brought by appellant, Mountain Home Lumber Company, Limited, which shall hereafter be designated as the Lumber Company, against appellant, Swartwout and respondents, Alma Lorene Meserole, formerly Alma Lorene Smith, E. D. Meserole, and Clara Ludell Smith. A cross-complaint was filed by appellant, Swartwout, and a separate cross-complaint by respondents, Meserole and Smith, respectively, asking that the title be quieted in them. The trial court gave judgment, quieting title in respondents, Meserole and Smith. From this judgment the Lumber Company and Swartwout have prosecuted separate appeals.

Prior to the accruing of any of the several claims the title to the property was in one William C. Niblack. One John H. Garrett was secretary of the Great Western Beet Sugar Com-

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pany, which shall hereafter be designated as the Sugar Company, a corporation, which, among other things, was selling lands and water rights. On May 22, 1903, the board of directors of the Sugar Company appointed Garrett to take charge of and manage the company's affairs at Mountain Home, Elmore County, with full power to act in the capacity of general manager, as provided in its by-laws, and further authorized and instructed him "to make and execute any and all papers such and [as] water deeds, deeds or conveyances, contracts and agreements, which are necessary and pertinent under and by virtue of the Articles of Incorporation and the By-laws of the Company, and to place a copy of this resolution, duly signed by the President of the Company and attested by the seal of the Corporation, on file . . . at Mountain Home, Elmore County, Idaho." This resolution was signed by the president, the corporate seal was affixed thereto and it was recorded in Elmore county on December 7, 1904, at the request of Garrett.

Swartwout lived in North Dakota and was induced to come to Mountain Home, for the purpose of buying land, by one Browning, an agent of the Sugar Company. Arriving at Mountain Home he met Garrett. We quote from his testimony on direct examination, as follows:

"Q. Did you have any dealings with Mr. Garrett as representing that company at that time? In 1906? A. Yes, sir.

"Q. Did your dealings refer any way to the property in question in this suit? A. Yes, sir.

"Q. How was your attention first directed to that property? A. He had promoter thru the country, one Browning came to our town selling Sugar Beet land and I got to talking with him.

"Q. Was this in North Dakota? A. Yes, sir.

"Q. After you came to Mountain Home, Idaho, when and how was your attention directed to the property in question in this suit? A. I came here and saw Mr. Garrett and saw Mr. Browning here.

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“Q. Did Mr. Garrett have anything to say about this particular ten acres in controversy? A. Said he had ten acres he would like to sell me.

“Q. Did you look at the property? A. I did.

“Q. Who went with you? A. Mr. Garrett went out in the buggy and Mr. Browning and I walked out and walked back.”

On March 28, 1906, Garrett gave Swartwout the Sugar Company's bond for a deed, signed and acknowledged by himself as secretary, which was filed for record by Swartwout March 29, 1906. On February 6, 1907, Garrett gave Swartwout the company's warranty deed, signed and acknowledged by himself as secretary, which was filed for record by Swartwout March 5, 1907. On April 15, 1907, Niblack deeded the property to Garrett. On July 10, 1908, the Lumber Company recovered judgment against Garrett in the district court. On September 8, 1908, one Norell docketed in the district court a judgment which he had obtained against Garrett in the probate court. On June 3, 1909, the property was sold on execution, under the Norell judgment, to respondents, Meserole and Smith, and on June 3, 1910, they received a sheriff's deed to the property. On June 11, 1910, the property was sold on execution, under the Lumber Company's judgment and bid in by the Lumber Company, and on July 12, 1911, the latter received a sheriff's deed therefor.

Clara Ludell Smith, one of the respondents, some time in 1908 was employed by her father, who was recorder of Elmore county, in the office as deputy, and continued to work in that capacity, at least until the date of the trial. During this time she bought a tax sale certificate to the property, then sent notice to Swartwout, who came in and redeemed, paying her the amount of the tax, interest and penalty. Swartwout received his first notice as to the true condition of the title when he finally procured an abstract of title, long after he had taken the deed of the Sugar Company from Garrett.

Meserole and Smith cannot claim as *bona fide* purchasers as against Swartwout, for they had actual notice of his bond for a deed, and also his deed. No one, who takes with notice

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of outstanding claims or equities, can successfully set up the claim of *bona fide* purchaser. Nor can they claim as *bona fide* purchasers as against the Lumber Company, for they had constructive notice of the latter's judgment, which was a prior lien. The sheriff's deed to the Lumber Company effectually wiped out their legal title. They were left with no rights as against Swartwout, and with a mere right to redeem as against the Lumber Company. Since they did not redeem they stand solely on their pretended legal title, and may be eliminated from further consideration in this case, as the legal title stands in the Lumber Company.

But the latter is equally precluded from claiming as a *bona fide* purchaser; first, because of the constructive notice of Swartwout's interest imputed from the record of his bond for a deed, and deed; and again, for the reason that it merely credited the amount bid at the execution sale on its judgment. This was not a valuable consideration for it amounted to nothing more than a cancelation, *pro tanto*, of a pre-existing indebtedness. (*Land v. Hea*, 20 Ida. 250, 118 Pac. 506.) While there is respectable authority to the contrary, we are constrained to follow the rule hitherto announced by this court in the latter case. Nor can it be regarded as an irrevocable consideration for, since the Lumber Company took only the legal title, subject to Swartwout's equities, its judgment against Garrett could be revived. (Sec. 4498, Rev. Codes.) A purchaser who parts with a consideration neither valuable, nor irrevocable, is not a *bona fide* purchaser. (2 Pom. Eq. Jur., secs. 745-751.)

It follows that the Lumber Company received, under its execution sale, only such interest as Garrett actually had in the property. If Garrett, under the circumstances, would be estopped to question Swartwout's title, then the Lumber Company is likewise estopped. If Garrett's title is impressed with a trust in favor of Swartwout, then the Lumber Company's title is impressed with the same trust. (39 Cyc. 562, note 40.)

Garrett was not only acting as secretary and general manager of the Sugar Company when the bond for a deed and

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the deed were given by that company to Swartwout and signed and acknowledged by Garrett, as secretary, but the evidence above quoted conclusively shows that in addition to his official capacity as secretary he was acting in the further representative and fiduciary capacity of agent in inducing Swartwout to buy the land from the Sugar Company. This evidence is sufficient to work an estoppel against Garrett and in favor of Swartwout. While there are some authorities to the contrary, the weight of authority is that a deed made in representative capacity estops the grantor. (16 Cyc. 712.)

Garrett took title in himself only two months after executing, as secretary, the Sugar Company's deed to Swartwout. There being no evidence to the contrary, it must be conclusively presumed that he was still secretary when he took title from Niblack. But as between Garrett and Swartwout, whom he had induced to purchase the land and to whom he delivered the Sugar Company's warranty deed therefor, it is immaterial whether he was still secretary, when taking title in himself. His conduct has forever estopped him from questioning Swartwout's title or the right of the Sugar Company to convey it.

The principle, so far as Garrett's acts as secretary were concerned, was stated in *Battery Park Bank v. Western Carolina Bank*, 138 N. C. 467, 50 S. E. 848, 849, as follows: "These facts present every element of an equitable estoppel against the assertion of any lien or encumbrance on the property in favor of the claimant, Campbell. He conveys the title to the cigarette company, for full value, by deed containing a covenant that the same is free from any and all encumbrances. True, this was a conveyance by the corporation, and therefore is not an estoppel by deed against Campbell, as an individual. *But he signed the deed for the company as its president, and to that extent he was an actor in the matter, and this covenant that the property is free from encumbrances amounts to a representation by him that this is true.*" (Italics ours.) A similar principle is announced in *Carothers v. Alexander*, 74 Tex. 309, 12 S. W. 4-12. A case more nearly

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in point on the facts is, *Central Coal & Iron Co. v. Walker's Exrs.*, 24 Ky. L. Rep. 2191, 73 S. W. 778. In that case, Walker, as president of the corporation, conveyed its entire realty to a trustee to secure a debt and then acquired, as an individual, an outstanding interest. The corporation then conveyed its equity to a second company which assumed the debt. It was held that Walker was estopped to set up his individual interest as against the second company, the court saying: "An officer of the corporation cannot acquire an interest in land in the possession of the corporation so as to divest the possession of the corporation But even if we are wrong on this proposition, it is perfectly clear that Walker and his heirs at law are estopped from asserting claim to any part of this tract of land in the hands of the Central Coal Company, after he had himself, as president, conveyed the entire tract of land to Murray in trust to secure the payment of the bond issued by the company, which the Central Company thereafter assumed to pay." (Italics ours.) It is clear that in the latter case the decision does not rest upon the fact that Walker was still acting as the president of the company when he sought to acquire an interest in the property for himself.

Nor is it any answer to say that Garrett was merely acting as an officer of the company or in his official or ministerial capacity. "No one should be permitted to escape personal liability for fraud practiced by himself, or in connection with others, upon another, in his or their official character of president, director, or secretary of a private corporation, upon the ground that they were acting for the corporation. To claim exemption on the ground of official responsibility, or that the fraud was committed for the benefit of the corporation, is equivalent to claiming that the corporation is liable for the fraud of its officers, and the officers themselves not liable. As was said in *Hempfling v. Burr*, 59 Mich. 294, 26 N. W. 496, "This is a very singular result, and one which is too unreasonable to bear consideration." (*Bank of Atchison County v. Byers*, 139 Mo. 627, 41 S. W. 325-333.) To permit Garrett to assert his title would not only work a

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fraud upon Swartwout, but would operate to make the Sugar Company guilty of a fraud arising out of transactions handled by Garrett while standing in a fiduciary relation to the company.

But we are further of the opinion that there are sufficient facts in this record to raise an estoppel against Garrett, even though the fact that he acted as secretary for the Sugar Company should be eliminated. In his capacity as agent for the company he induced Swartwout to believe that the land belonged to the company and with one of his agents, Browning, took Swartwout to the land and closed the deal with him, still in that belief, and delivered the company's warranty deed to him. This is sufficient to raise an estoppel against Garrett by conduct. "A strong case of estoppel is made out when by conduct or representation an owner encourages another to believe that a third person is the owner of land, and thereby induces him to purchase. . . . A difference is recognized by some of the authorities between mere silence and encouragement. In the latter case, the owner's representations or conduct will stop him though he may have been ignorant of his title, for though there may have been no fraudulent intent, yet the assertion of his title would operate as a fraud, in the same manner as if there had been a fraudulent purpose." (10 R. C. L. 781; *Kirk v. Hamilton*, 102 U. S. 68, 26 L. ed. 79.)

Where an agent induced action "in reliance upon express or implied representations of authority, the agent and not the other party should assume the risk. Of these two, the agent is the one who takes the initiative; he is usually in the better situation to know of the existence of the authority, and where he undertakes, either expressly or by implication, to induce action, in reliance upon its existence, he would seem to be the party upon whom the risk of its nonexistence should fall." (1 Mechem on Agency, sec. 1362.)

It follows that whatever interest or title Garrett took subsequent to Swartwout's deed became immediately impressed with a trust for the benefit of Swartwout, and that when the

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Lumber Company bid in the property on its execution sale, with notice, it received and could receive, under the circumstances, only such title and interest as Garrett had, and must be said to have taken the legal title in trust for Swartwout, and subject to every element of estoppel that could be urged against Garrett.

The findings and the judgment, quieting title in respondents, Meserole and Smith, are clearly erroneous. The judgment is reversed and the trial court directed to prepare findings of fact in accordance with the views herein expressed and to enter judgment, quieting title in appellant, Swartwout, who is awarded his costs on this appeal. The other parties to the appeal must pay their own costs.

Morgan, J., concurs.

Rice, J., concurs in the result.

(June 30, 1917.)

MURIEL HARGIS, an Infant, by BURGESS HARGIS, His Guardian ad Litem, Appellant, v. AUGUST PAULSEN et al., Copartners, Doing Business Under the Firm Name and Style of HERCULES MINING COMPANY, Respondents.

[166 Pac. 264.]

INSUFFICIENCY OF EVIDENCE—MOTION FOR NONSUIT—WHEN GRANTED.

1. Where the evidence is so uncertain as to leave it equally clear and probable that the injury may have been caused by any one of several parties, and there is a total absence of proof that the injury was the result of the negligence or carelessness of the defendant, then a verdict would be pure speculation and could not be sustained and it would be the duty of the trial court to grant a nonsuit.

2. *Held*, that the trial court did not err in granting respondent's motion for a nonsuit, an examination of the record disclosing the

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fact that there was no evidence upon which a verdict for appellant could be sustained.

[As to mere scintilla of evidence as sufficient to justify submission of case to jury, see note in *Ann. Cas.* 1914B, 472.]

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. W. W. Woods, Judge.

Action for damages for personal injuries. Motion for nonsuit granted. *Affirmed.*

John P. Gray, and Therrett Towles, for Appellant.

A case was made out for the jury and the defendants are liable under the evidence. (*Akin v. Bradley Engineering & Mach. Co.*, 48 Wash. 97, 92 Pac. 903, 14 L. R. A., N. S., 586; *Davis v. Wenatchee*, 86 Wash. 13, 149 Pac. 337; *Mathis v. Granger Brick & Tile Co.*, 85 Wash. 634, 149 Pac. 3; *Crabb v. Wilkins*, 59 Wash. 302, 109 Pac. 807; *Pittsburgh C. & St. L. R. Co. v. Shields*, 47 Ohio St. 387, 21 Am. St. 840, 24 N. E. 658, 8 L. R. A. 464.)

One who maintains dangerous instrumentalities or appliances on his premises of a character likely to attract children in play, or permits dangerous conditions to remain thereon with the knowledge that children are in the habit of resorting thereto for amusement, is liable to a child *non sui juris* who is injured therefrom even though a trespasser. (*Mattson v. Minnesota & N. W. R. Co.*, 95 Minn. 477, 111 Am. St. 483, 5 Ann. Cas. 498, 104 N. W. 443, 70 L. R. A. 503.)

C. W. Beale and John Wourms, for Respondents.

"Evidence that leaves the jury to roam at will in the field of conjecture and speculation to find a verdict can no more be tolerated by courts of justice than a judgment without any evidence." (*Bowen v. Illinois Cent. R. Co.*, 136 Fed. 306, 69 C. C. A. 444, 40 L. R. A. 915; *Holt v. Spokane etc. Ry. Co.*, 4 Ida. 443, 40 Pac. 56; *Sherman v. Menominee River Lumber Co.*, 77 Wis. 14, 22, 45 N. W. 1079.)

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The plaintiff has not brought himself within the rule as laid down by any of the decisions cited in his brief upon the question of explosives. In the following cases recovery was not permitted where the defendants had been connected affirmatively with the instrumentality causing the injuries, a condition entirely wanting in the case at bar. (*Obertoni v. Boston & M. R. R.*, 186 Mass. 481, 71 N. E. 980, 67 L. R. A. 422; *Affick v. Bates*, 21 R. I. 281, 79 Am. St. 801, 43 Atl. 539; *Hughes v. Boston & M. R. R.*, 71 N. H. 279, 83 Am. St. 518, 51 Atl. 1070.)

BUDGE, C. J.—This is an action for damages for personal injuries alleged to have been sustained by the appellant through the negligence of the respondents. The case was tried by the court and a jury. At the close of the appellant's evidence respondents made a motion for a nonsuit, on the ground that appellant had failed to make out a sufficient case for the jury, for the reason that there was no proof connecting respondents with the alleged acts of negligence which caused the injury. The trial court sustained the motion and rendered judgment, dismissing the action. This appeal is from the judgment.

Appellant's brief contains six separate assignments of error. We will confine our discussion to assignments Nos. 5 and 6, as the view we have taken of the case renders it unnecessary to express an opinion on the first four assignments. Assignments Nos. 5 and 6, are as follows:

"V. The court erred in granting the motion of the defendants for a nonsuit.

"VI. The court erred in entering a judgment of dismissal of said action."

It will be seen that these two assignments involve but one point, that is, whether or not appellant made out such a case as would entitle him to have it submitted to the jury.

The facts elicited upon the trial and upon which appellant relies are as follows: On August 16, 1913, Eldon Hargis, eight years of age, in company with his two little brothers, Fred aged five and appellant aged three, started from their

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home afoot to meet their father, Burgess Hargis, in whose name this action was brought, and who was then in the employ of the respondents in their mine. They were overtaken by a Mr. Spekker and rode up the hill along the public road, in the direction of the mine, on his wagon. At a point along the road by the Hercules property, Eldon saw some primers, made by attaching a piece of fuse to a dynamite cap, lying at the side of the road by a rock, a short distance from the wheel-track. Shortly thereafter the children came back and Eldon picked up the primers and he and his two little brothers took them down to a property, known as the lower Stanley, where Eldon lighted the fuse on one of them with a candle; the cap exploded, and as a result of the explosion appellant lost one eye and sustained some injury to the other one.

The evidence shows that the road in question was a public road, and while it appears that respondents made more use of it than anyone else, it also appears that it was used by a number of other miners and prospectors, who transported over said road supplies, useful for mining purposes, such as fuse, caps, powder, coal, steel, etc. There is no evidence that respondents had been using primers or doing any blasting in the immediate vicinity where the primers in question were found, nor that they had ever been negligent or careless in the use of such explosives. The strongest inference that can be deduced from any of the evidence is that the primers were probably accidentally dropped by someone. There is nothing in the record which tends to throw any light upon who was responsible for having left the primers where they were found. So far as it is made to appear by the evidence, they might have been left there by any one of a dozen or more different parties.

The theory of appellant is that he has made a *prima facie* case against the respondents by process of elimination, and he contends that he has shown that the primers could not have been left upon the public highway, where found, by any person or persons other than the respondents, and that it therefore follows necessarily that the primers were left upon the highway by the respondents, their agents or employees. This

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conclusion is not borne out by the record; so far as the evidence discloses it operates as effectively to eliminate the respondents as it does to eliminate any other user of the public highway in question.

While it is true, as was said by this court in *Culver v. Kehl*, 21 Ida. 595-597, 123 Pac. 301: "It is now the well-settled rule in this state that on a motion by the defendant for a nonsuit where the plaintiff has introduced his evidence and rested his case, the defendant must be deemed to have admitted all the facts of which there is any evidence and all the facts which the evidence tends to prove, and that the evidence must be interpreted most strongly against the defendant," still, after indulging in all presumptions which follow from this rule, such facts must make a *prima facie* showing of negligence in order to entitle plaintiff to recover. (*Adams v. Bunker Hill etc. Mining Co.*, 12 Ida. 643-650, 89 Pac. 624, 11 L. R. A., N. S., 844.) In the latter case the court used the following language, which is particularly applicable to the facts in the case at bar:

"It must be readily admitted that where the evidence in a case of this kind is so uncertain as to leave it equally clear and probable that the injury resulted from any one of 'half a dozen causes' then a verdict would be pure speculation, and could not be sustained. . . ." (See, also, *Holt v. Spokane etc. Ry. Co.*, 4 Ida. 443, 40 Pac. 56.)

The record shows that the trial court summed up the case with accuracy, when in ruling upon the motion, the court said: "If there were any evidence here that the Hercules or its employees left the primers there on the public road I should not hesitate to deny this motion. I cannot myself guess, and shall not ask the jury to guess on it."

From a very careful examination of the record, we have reached the conclusion that in this case a *prima facie* showing of negligence against respondents was not made. There is no evidence upon which a verdict could be sustained. The judgment is, therefore, affirmed. Costs awarded to respondents.

Morgan and Rice, JJ., concur.

Points Decided.

(June 30, 1917.)

WILLIAM DWYER, Respondent, v. W. A. LIBERT,
Appellant.

[167 Pac. 651.]

LIBEL—WORDS ACTIONABLE PER SE—EVIDENCE—PRIVILEGED COMMUNICATION—MALICE—EXEMPLARY DAMAGES—PLEADING.

1. In determining whether particular words are actionable *per se*, the same rule does not apply to libel as to slander.

2. A written communication of a character conducive to blacken the reputation of the person referred to, or excite ridicule or wrath against him, or destroy public confidence in him, is actionable without proof of special damage.

3. A written publication charging one with wilful falsehood in the matter of a serious business transaction must necessarily expose him to contempt and lower him in the common estimation of citizens, and is therefore actionable *per se*.

4. A complaint against a public officer filed with a body having a right to discharge him is conditionally privileged upon good faith and the absence of malice.

5. Where a complaint has been made against D., a public officer, who thereupon requests that the complaint be filed in writing, in order that he may be heard thereon, a privilege is created in the plaintiff conditioned upon good faith and the absence of malice.

6. The question of good faith and malice is one for the jury.

7. Where the general allegations of a complaint are sufficient to show that the wrong complained of was inflicted with malice or oppression or like circumstances, the complaint will be sufficient to authorize the infliction of exemplary damages.

8. Where under the pleadings of a case exemplary damages may be allowed, the pecuniary ability of the defendant is a proper matter for the consideration of the jury.

[As to complaint against public officer or employee to person or body having power in matter as privileged within law of libel and slander, see note in Ann. Cas. 1913C, 824.]

APPEAL from the District Court of the Second Judicial District, for Nez Perce County. Hon. Edgar C. Steele, Judge.

Argument for Appellant.

Action for libel. Judgment for plaintiff. *Affirmed.*

Miles S. Johnson and Jas. F. Ailshie, for Appellant.

"The necessity of keeping the administration of public corporations pure and efficient, the importance of punishing derelictions of duty on the part of officials thereof, and the danger of silencing inquiry, all tend to render communications of this kind, if made in good faith, privileged, even though at times the effect of the rule may be to work injustice in particular cases." (*Greenwood v. Cobbey*, 26 Neb. 449, 42 N. W. 413, at page 415.)

"When the words alleged to be slanderous are embraced in the class of privileged communications, the plaintiff is bound to prove the existence of malice as the real motive of the defendant's language." (*Beller v. Jackson*, 64 Md. 589, 2 Atl. 916, 917.)

"If the publication is *prima facie* privileged, it devolves on the plaintiff to allege and prove that it was both false in fact, and malicious in purpose." (*Redgate v. Roush*, 61 Kan. 480, 59 Pac. 1050, 1051, 48 L. R. A. 236.)

"A petition to the executive, or other appointing power, in favor of an applicant, is a publication thus privileged. No action will lie for false statements contained in it, unless it be shown it was both false and malicious." (*Kirkpatrick v. Eagle Lodge*, 26 Kan. 384, 391, 40 Am. Rep. 316; *Fowles v. Bowen*, 30 N. Y. 20, 25; *Bearce v. Bass*, 88 Me. 521, 51 Am. St. 446, 452, 34 Atl. 411; *Coogler v. Rhodes*, 38 Fla. 240, 56 Am. St. 170, 176, 21 So. 109.)

The presumption which attaches to a writing written on a privileged occasion is that it was written in good faith and upon probable cause. (*Hemmens v. Nelson*, 138 N. Y. 517, 524, 34 N. E. 342, 20 L. R. A. 440; *Denver Public Warehouse Co. v. Holloway*, 34 Colo. 432, 114 Am. St. 171, 7 Ann. Cas. 840, 83 Pac. 131, 133, 3 L. R. A., N. S., 696; 25 Cyc. 494, 523, 524, 548; 18 Ency. Law, 2d ed., 1040; *Kent v. Bongartz*, 15 R. I. 72, 2 Am. St. 870, 22 Atl. 1023.)

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When the filing of a statement with a city, without a request, is privileged, it becomes doubly so when it is so filed at the request of the plaintiff himself.

"If the plaintiff consented to or authorized the publication complained of, he cannot recover for any injury sustained by reason of the publication." (*Schoepflin v. Coffey*, 162 N. Y. 67, 56 N. E. 502, 505; *O'Donnell v. Nee*, 86 Fed. 96; 25 Cyc. 370, 371; *Shinglemeyer v. Wright*, 124 Mich. 230, 82 N. W. 887, 50 L. R. A. 129, 132; *Melcher v. Beeler*, 48 Colo. 233, 139 Am. St. 273, 110 Pac. 181, 186.)

No special damages were alleged in the complaint. None being alleged, none could be proven, and no attempt was made by the plaintiff to prove any. (*Nichols v. Daily Reporter Co.*, 30 Utah, 74, 116 Am. St. 796, 8 Ann. Cas. 841, 83 Pac. 573, 575, 3 L. R. A., N. S., 339; *Stannard v. Wilcox etc. Sewing Machine Co.*, 118 Md. 151, Ann. Cas. 1914B, 709, 84 Atl. 335, 42 L. R. A., N. S., 515.)

To be actionable without proof of special damages, the words must contain an implication such as is necessarily hurtful in its effect upon plaintiff's business, and must touch him in his special trade or occupation. (25 Cyc. 337; *Nichols v. Daily Reporter Co.*, 30 Utah, 74, 116 Am. St. 796, 8 Ann. Cas. 841, 83 Pac. 573, 575, 3 L. R. A., N. S., 339; *Brown v. Independent Publishing Co.*, 48 Mont. 374, 138 Pac. 258, 259; *Lemmer v. The Tribune*, 50 Mont. 559, 148 Pac. 338.)

The matter alleged to be libelous, contained in the charges filed with the city council, nowhere charges the plaintiff with any act which, if true, would constitute a crime, and for that reason it is not libelous *per se*, and only becomes libelous by reason of some special or peculiar effect it has on the business and standing of the complaining party, which must be charged by innuendo. It did not cause the loss of his position, and no special damage is claimed. (*Douglas v. Douglas*, 4 Ida. 293, 38 Pac. 934; *Pollard v. Lyon*, 91 U. S. 225, 23 L. ed. 308; *Moore v. Johnson*, 147 Ky. 584, 144 S. W. 765; *Jones v. Banner*, 172 Mo. App. 132, 157 S. W. 967; *Boyce v. Wheeler*, 161 Mo. App. 504, 144 S. W. 119; *Velikanje v. Muli-*

Argument for Respondent.

champ, 67 Wash. 138, 120 Pac. 876; *Whitley v. Newman*, 9 Ga. App. 89, 70 S. E. 686.)

"The civil action for libel is an action for damages, and, as in other actions sounding in tort, compensatory damages only can be recovered. It is obvious that these would be the same no matter what the motive which inspired the publication." (*Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 26 Am. St. 842, 25 Pac. 1072, 11 L. R. A. 689; *Wilson v. Sun Publishing Co.*, 85 Wash. 503, Ann. Cas. 1917B, 442, 148 Pac. 774, 779.)

There is no statute in Idaho of which we are aware allowing exemplary or punitive damages, except as applied to special acts of injury, such as forcible entry and detainer (sections 4533 and 5106, Rev. Codes), and cutting and removing trees, timber, etc. (sec. 4531).

If you allow the plaintiff in a civil action under a penal statute to recover damages as a punishment and example to the defendant, and then he is prosecuted and the state collects a fine for the same offense, you are collecting two penalties. The correct rule would seem to be to allow only actual damages to the plaintiff. (*Winkler v. Roeder*, 23 Neb. 706, 8 Am. St. 155, 37 N. W. 607; *Bank of Commerce v. Goos*, 39 Neb. 437, 58 N. W. 84, 23 L. R. A. 190; *Murphy v. Hobbs*, 7 Colo. 541, 49 Am. Rep. 366, 5 Pac. 119.)

Clay McNamee and Palmer H. McIntyre, for Respondent.

Every communication is privileged which is made in good faith with a view to obtain redress for some injury received, or to prevent or punish some public abuse. This privilege, however, must not be abused; for if some communication be made maliciously and without probable cause, the pretense under which it is made instead of furnishing a defense will aggravate the case of the defendant. (Newell on Slander and Libel, 2d ed., p. 542, par. 1; *Bodwell v. Osgood*, 20 Mass. (3 Pick.) 379, 15 Am. Dec. 228.)

A publication which imputes an unwillingness or refusal to pay just debts is libelous *per se*, as tending to destroy the party's reputation for integrity and fair dealing. (*Morgan*

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v. Andrews, 107 Mich. 33, 64 N. W. 869; *Davis v. Hamilton*, 85 Minn. 209, 88 N. W. 744; *Mertens v. Bee Pub. Co.*, 5 Neb. Unof. 592, 99 N. W. 847; *Sanders v. Hall*, 22 Tex. Civ. 282, 55 S. W. 594; *Muetze v. Tuteur*, 77 Wis. 236, 20 Am. St. 115, 46 N. W. 123, 9 L. R. A. 86; *Ingraham v. Lyon*, 105 Cal. 254, 38 Pac. 892.)

The pecuniary circumstances of defendant are admissible in favor of plaintiff as tending to show the influence his words would have and the consequent extent of the injury. (8 Ency. Ev. 260, and notes; *Barkly v. Copeland*, 74 Cal. 1, 5 Am. St. 413, 15 Pac. 307; *Barber v. Barber*, 33 Conn. 335; *Hintz v. Graupner*, 138 Ill. 158, 27 N. E. 935; *Fowler v. Wallace*, 131 Ind. 347, 31 N. E. 53; *Herzman v. Oberfelder*, 54 Iowa, 83, 6 N. W. 81; *Stanwood v. Whitmore*, 63 Me. 209; *Shute v. Barrett*, 7 Pick. (24 Mass.) 82; *Loranger v. Loranger*, 115 Mich. 681, 74 N. W. 228; *Taylor v. Pullen*, 152 Mo. 434, 53 S. W. 1086; *Kidder v. Bacon*, 74 Vt. 263, 52 Atl. 322; *Harman v. Cundiff*, 82 Va. 239.)

It is clearly competent for a jury to find vindictive damages in an action of libel or slander. (Newell on Slander and Libel, 2d ed., pp. 842-846, and notes.)

Wherever such (exemplary) damages are recoverable at all for malicious wrongs, they may be recovered for libel and slander, especially so where words are actionable *per se*. (4 Sutherland on Damages, 4th ed., sec. 1216, and notes; 25 Cyc. 536.)

California, under statute similar to Idaho, has adopted the rule contended for. (*Childers v. San Jose Mercury Printing & Pub. Co.*, 105 Cal. 284, 45 Am. St. 40, 38 Pac. 903; *Lick v. Owen*, 47 Cal. 252; *Edwards v. San Jose Printing & Pub. Soc.*, 99 Cal. 431, 37 Am. St. 70, 34 Pac. 128.)

RICE, J.—This is an action for libel brought by the respondent William Dwyer against appellant W. A. Libert. The respondent, shortly prior to the time the action arose, was employed by the city of Lewiston in the capacity of patrolman. Certain charges were made by the appellant to the mayor and city council of the city of Lewiston, resulting

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in the discharge of the respondent. Respondent's attorney thereupon appeared before the council and requested that body to request the appellant to file his charges in writing and to have a date set so that respondent might be there for the purpose of a hearing. The council reconsidered its action and requested appellant to file his charges in writing. Appellant thereupon had his charges prepared and filed with the city council, which writing contained the following matter alleged to be libelous, to wit:

"Complainant had several talks with William Dwyer during the few days following and on or about the 30th day of September, 1915, the said William Dwyer informed the complainant that Kittie Begle would be down on Saturday following, at which time the matter would be fixed up by securing the indebtedness with a mortgage, which said conversation was later confirmed by Mr. Dwyer in a conversation with Center Alexander, acting as the agent of Joseph Alexander. That at the time of making this statement to W. A. Libert and confirmation of same to Center Alexander the said William Dwyer was knowingly making false statements in, to wit: That on the 22d day of July, 1915, the said Kittie Begle had redeeded to Kittie Dwyer as her sole and separate property the real property in question, which deed had been held and was so held by said parties at the time of the conversation of September 25th, and was together with a homestead declaration of Kittie Dwyer placed of record in the office of the county recorder on the 28th day of September, 1915, and was so of record at the time the said William Dwyer was promising W. A. Libert to have the said Kittie Begle come down and secure the indebtedness with a mortgage on or about the 30th day of September. That the entire question of having the said Kittie Begle enter into the matter was held out by the said William Dwyer falsely, for the reason that on the 22d day of July, 1915, over two months before the 25th day of September, 1915, the said Kittie Begle had ceased to have any interest legal or otherwise to said property."

The complaint contained no colloquium or innuendo, and no special damages were claimed in the complaint.

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It is urged that the complaint does not state a cause of action; that the written charge does not contain language which is libelous *per se*, and that the complaint contains no innuendo showing that on account of the circumstances the matter was libelous as against respondent.

Criminal libel is defined by sec. 6737, Rev. Codes, as follows: "A libel is a malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural or alleged defects, of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule." In the case of *State v. Sheridan*, 14 Ida. 222, 93 Pac. 656, 15 L. R. A., N. S., 497, it was noted that in determining whether particular words were actionable *per se*, the same rule does not apply to libel as to slander. In the case of *Farley v. Evening Chronicle Pub. Co.*, 113 Mo. App. 216, 87 S. W. 565, at p. 568, the supreme court of Missouri said: "But written or printed matter which is communicated to third parties stands on a different footing and is often actionable when it would not be if spoken. As intimated, if it is of a character conducive to blacken the reputation of the person referred to, or excite ridicule or wrath against him, or destroy public confidence in him, it is actionable without proof of special damage. The reason assigned for this legal difference between written and spoken language is that writing or printing injurious statements about a person implies a deliberate purpose to do harm, whereas detrimental words are often spoken thoughtlessly or in a passion. Weight is allowed, also, to the more enduring character and wider vogue of published statements. Odgers, Libel and Slander, 4th ed., p. 4." (See, also, Cooley on Torts, 3d ed., p. 399.)

We have no doubt that the written publication of the words alleged in the complaint is actionable *per se*. Truthfulness is one of the basic virtues, perhaps the most fundamental of all. To charge a man in a written publication with wilful falsehood in the matter of a serious business transaction must necessarily expose him to contempt, and have a

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tendency to lower him in the common estimation of citizens. (*Riley v. Lee*, 88 Ky. 603, 21 Am. St. 358, 11 S. W. 713; 25 Cyc. 255; *Hatt v. Evening News Assn.*, 94 Mich. 114, 53 N. W. 952; *Lindley v. Horton*, 27 Conn. 58; *Paxton v. Woodward*, 31 Mont. 195, 107 Am. St. 416, 3 Ann. Cas. 546, 78 Pac. 215; *Monson v. Lathrop*, 96 Wis. 386, 65 Am. St. 54, 71 N. W. 596.)

Appellant next contends that there was no evidence of the falsity of the publication, but that, on the contrary, the proof of the truth of the publication was conclusive. The gist of the libel is contained in the statement that at the time of making the statement to appellant, and to one Alexander, that "Kittie Begle would be down on the Saturday following at which time the matter would be fixed up by securing the indebtedness with a mortgage," the respondent was knowingly making a false statement, in that at that time Kittie Begle had reconveyed the property to the wife of respondent, who had filed a homestead declaration upon the same, and therefore Kittie Begle would be entirely unable to give the mortgage security. The testimony of respondent was to the effect that appellant at the time of the conversation referred to was threatening to bring suit against Kittie Begle, and that respondent had told appellant that he need not send the summons to the town of Nez Perce to serve upon her and thus interfere with her duties, as she would be down to Lewiston on the following Saturday. Respondent denied that he stated to appellant, or Alexander, that she would give a mortgage as security. The wilful falsehood charged was in misleading appellant into believing that he would receive mortgage security for his indebtedness. On this matter the evidence was conflicting, and the determination of the fact was properly left to the jury.

It is next contended that the communication was privileged, for the reason that it was filed with a body that had the right to discharge a public officer. In a case of this kind the communication is qualifiedly privileged, and in order for one who makes such publication to claim the benefit of the

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privilege, the statement must be made in good faith and in the absence of malice.

In the case of *Foster v. Scripps*, 39 Mich. 376, 33 Am. Rep. 403, we find the following: "But where a person occupies an office like that of a city or district physician, not elected by the public, but appointed by the council, and subject only to removal by the council, we have found no authority, and we think there is no reason, for holding any libel privileged except a *bona fide* representation made without malice to the proper authority, complaining on reasonable grounds." (*Bodwell v. Osgood*, 20 Mass. (3 Pick.) 379, 15 Am. Dec. 228; *Finley v. Steele*, 159 Mo. 299, 60 S. W. 108, 52 L. R. A. 852; *Howarth v. Barlow*, 113 App. Div. 510, 99 N. Y. Supp. 457.)

The question of the good faith of the publication and the absence of malice, under the evidence, was properly left for the jury to determine.

It is next contended that as respondent requested the mayor and city council to have appellant file his charges in writing, he thereby consented to the publication of the libelous matter, and is in no condition to complain.

If the only publication that can be proved is one made by the defendant in answer to an application from the plaintiff, or some agent of the plaintiff, demanding explanation, such answer, if fair and relevant, will be held privileged, for the plaintiff brought it upon himself; but a person cannot take advantage of an opportunity given by request of the plaintiff to gratify his malice. (*Laughlin v. Schnitzer* (Tex. Civ.), 106 S. W. 908.)

In the case of *Luzenberg v. O'Malley*, 116 La. 699, 41 So. 41, at p. 44, the following language is used: "It would seem to be too plain to allow of difference of opinion that, when plaintiff challenged defendant to name the 'reasons too numerous to mention' why he was unfit to be district attorney, or even to practice law, he did not request defendant to publish malicious falsehoods about him." (See, also, *Schultz v. Guldenstein*, 144 Mich. 636, 108 N. W. 96.)

In this case it cannot be said that plaintiff requested the publication for the purpose of bringing an action thereon,

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or consented to the publication of a libel against himself by appellant. Appellant had made verbal charges against him to the proper authorities, upon which charges it seems respondent was dismissed. In order that he might have an opportunity to answer the charges, of which he may have been more or less ignorant, he requested that the appellant file the charges in writing in order that he might be heard thereon. It cannot be said that the respondent requested the appellant to publish libelous matter about him. The request amounts to this, that if appellant in good faith and without malice had any charges to make against him, he would like to have such charges made in writing.

The question of the good faith of the appellant in filing the charges, and as to whether he was actuated by malice, was, under instructions of the court, properly left to the jury, and its finding thereon will not be disturbed.

Appellant objected at the trial to the following question, which objection was overruled and exception saved: "Q. Mr. Dwyer, are you generally acquainted with the financial standing and responsibility of Mr. Libert, that is, whether or not he is a poor man or a wealthy man?" Appellant assigns the overruling of defendant's objection as error.

"In actions for libel the weight of authority is conceded to be in favor of the rule that the pecuniary circumstances of the defendant are admissible in favor of the plaintiff as tending to show the influence his words would have and the consequent extent of the injury." (25 Cyc. 508.)

In 2 Sutherland on Damages, 4th ed., p. 1315, that authority says: "In other cases it has been held, and the better doctrine from its intrinsic reasonableness is, that so far as the cause of action rests upon an injury to character or an insult to the person compensatory damages may be increased by proof of the wealth of the defendant. This is upon the ground that wealth is an element which goes to make up his rank and influence in society, and thereby renders the injury or insult resulting from his wrongful act the greater. But in such cases as it is rather the reputation for, than the possession of, wealth which is the cause of this increased rank,

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the testimony should correspond and only the general question as to his circumstances can be asked, and not the details."

In the instant case, the allegations of the complaint would justify the jury in bringing in a verdict, not only for compensatory damages but also for exemplary damages. The complaint alleges that the charges were false and malicious, and published by the defendant with the deliberate purpose and intention of injuring the defendant in his good name and reputation and causing his dismissal as said patrolman of said city of Lewiston, Idaho.

In the case of *Stark v. Epler*, 59 Or. 262, 117 Pac. 276, the court said: "The rules of pleading do not require that the allegation relating to exemplary damages should be set out separately from the other averments of the complaint. Special damages must be grounded upon separate allegations, but exemplary damages are so intimately connected with general damages that if the general allegations are sufficient to show the wrong complained of was inflicted with malice or oppression or other like circumstances, the complaint will be sufficient to authorize the infliction of punitive or exemplary damages." (*Sullivan v. Oregon Ry. & Nav. Co.*, 12 Or. 392, 53 Am. Rep. 364, 7 Pac. 508; *San Francisco etc. Bldg. Soc. v. Leonard*, 17 Cal. App. 254, 119 Pac. 405; *Jaegar v. Metcalf*, 11 Ariz. 283, 94 Pac. 1094; *Martin v. Corscadden*, 34 Mont. 308, 86 Pac. 33.)

It is not necessary to the recovery of exemplary damages that they should be specially claimed in the complaint, but such damages may be recovered under a claim for damages generally. (*Harmening v. Howland*, 25 N. D. 38, 141 N. W. 131; *Shoemaker v. Sonju*, 15 N. D. 518, 11 Ann. Cas. 1173, 108 N. W. 42; *Nashville etc. Ry. v. Blackmon*, 7 Ala. App. 530, 61 So. 468; *Davis v. Seeley*, 91 Iowa, 583, 51 Am. St. 356, 60 N. W. 183.)

In 2 Sutherland on Damages, p. 1316, the author says: "But when exemplary damages are claimed a different question is presented. The defendant's pecuniary ability is then a matter for the consideration of the jury, on the ground that a given sum would be a much greater punishment to a man of

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small means than to one of larger. For this purpose the reputed wealth of the defendant may be proven, subject to his right to controvert the plaintiff's evidence, and the proof may be directed to his wealth at the time of the trial."

From the issues presented by the pleadings in this case, therefore, the question complained of was not objectionable. (*Binford v. Young*, 115 Ind. 174, 16 N. E. 142; *Marriott v. Williams*, 152 Cal. 705, 125 Am. St. 87, 93 Pac. 875; *Barkly v. Copeland*, 74 Cal. 1, 5 Am. St. 413, 15 Pac. 307.)

The other errors assigned by appellant we do not deem necessary to discuss. The judgment is affirmed. Costs awarded to respondent.

Morgan, J., concurs.

Budge, C. J., sat at the hearing but took no part in the decision.

Petition for rehearing denied.

(June 30, 1917.)

THE AVERILL MACHINERY COMPANY, a Corporation,
THE GARDEN CITY FEEDER COMPANY, a Corporation,
and JOHN W. SOMMERVILLE, as Executor of
the Last Will and Testament of J. H. SOMMERVILLE,
Deceased, Respondents, v. THE VOLLMER-CLEAR-
WATER COMPANY, LTD., a Corporation, Appellant.

[166 Pac. 253.]

CHATTEL MORTGAGE—CONVERSION—DAMAGES.

1. Evidence examined and found sufficient to sustain the findings of the lower court to the effect that the chattel mortgages in ques-

On loss of profits as element of damages for conversion of personal property, see note in 52 L. R. A. 51.

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tion were valid and subsisting liens upon the crop of barley, and that appellant wrongfully and unlawfully converted a portion of the same to its own use.

2. In an action for damages for the conversion of personal property, the rule of damages to be applied in the absence of special circumstances is the market value of the property at the time of conversion, plus interest.

[As to measure of damages in actions of trover, see notes in 24 *Am. Dec.* 70; 54 *Am. Rep.* 421.]

APPEAL from the District Court of the Second Judicial District, for Lewis County. Hon. Edgar C. Steele, Judge.

Action to foreclose chattel mortgages. Judgment for cross-plaintiffs. *Modified and affirmed.*

G. W. Tannahill, for Appellant.

There is the strongest kind of evidence that C. W. Rounds was the owner of the grain, and if so, F. W. Rounds had no right to mortgage it or attempt to do so, and any mortgage he might execute would be void. He could only mortgage such interest as he might have in the property. (*Bradley Land & Lbr. Co. v. Eastern Mfg. Co.*, 104 Me. 203, 71 Atl. 710; *Benjamin Schwarz & Sons v. Kennedy*, 142 Fed. 1027; *Morris v. Brown*, 177 Ala. 389, 58 So. 910; *Smith v. J. I. Case Threshing Mach. Co.*, 50 Pa. Super. Ct. 92; *Roper Wholesale Grocery Co. v. Faver*, 8 Ga. App. 178, 68 S. E. 883.)

The value which property has at the time of the conversion, whether market or actual, is the basis of damages in trover. The rule is not affected by either an increase or a decrease in its value subsequent to the conversion of it. (*Hepburn v. Sewell*, 5 Har. & J. (Md.) 211, 9 Am. Dec. 512; *Bates v. Stansell*, 19 Mich. 91; *Carter v. Feland*, 17 Mo. 383; *Hendricks v. Evans*, 46 Mo. App. 313; *Burney v. Pledger*, 3 Rich. L. (S. C.) 191; 13 Cyc. 170.)

Where personal property is taken possession of without authority of law and is retained and converted to the use of the person taking such possession in trover by the owner, the plaintiff is entitled to recover, as a general rule, the market

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value of such property at the time it was taken. (*Unfried v. Libert*, 20 Ida. 708, 119 Pac. 885; *Bates v. Nyberg Automobile Works*, 170 Ill. App. 301; *Hautala v. Dover*, 176 Mich. 366, 142 N. W. 579; *Whittler v. Sharp*, 43 Utah, 419, 135 Pac. 112, 49 L. R. A., N. S., 931; *Hassam v. J. E. Safford Lumber Co.*, 82 Vt. 444, 74 Atl. 197; *Hart v. Brierley*, 189 Mass. 598, 76 N. E. 286.)

G. Orr McMinimy, for Respondents.

If the property converted was of fluctuating value, the owner may recover, according to some authorities, the highest market value within a reasonable time after conversion; according to others, the highest value attained between the time of conversion and the bringing of the action, with interest; but by the weight of authority, the highest value between conversion and the day of trial. (*Lee v. Mathews*, 10 Ala. 682, 44 Am. Dec. 498; 38 Cyc. 2096; *Sharpe v. Barney*, 114 Ala. 361, 21 So. 490; *Fromm v. Sierra Nevada S. Min. Co.*, 61 Cal. 629; *Barrante v. Garratt*, 50 Cal. 112; *Lynch v. McGhan*, 7 Cal. App. 132, 93 Pac. 1044; *Straw v. Jenks*, 6 Dak. 414, 43 N. W. 941; *Robinson Mining Co. v. Riepe*, 37 Nev. 27, 138 Pac. 910; *Thompson v. Carter*, 6 Ga. App. 604, 65 S. E. 599.)

RICE, J.—During the year 1913, one F. W. Rounds was the owner of Lots 3 and 4 and the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ of Sec. 7, Tp. 34 N. of R. 1 W., B. M. On the 15th day of May, 1913, F. W. Rounds gave a chattel mortgage to John W. Sommerville, as executor of the last will and testament of J. H. Sommerville, deceased, on an undivided one-half of all the crop of grain of any kind or character growing or to be grown during the season of 1913 upon the said land. On the 8th day of August of the same year, F. W. Rounds and wife executed a chattel mortgage to the Averill Machinery Company, a corporation, on an undivided one-half of the crop of barley then growing on the said real estate, and on the last-mentioned date he and his wife executed another chattel mortgage to the Garden City Feeder Company, a corporation, on an undivided

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one-half of the crop of barley then growing on the said real estate.

It appears that during the year 1913 the only crop of grain raised on the said real estate was barley. This action was originally instituted by one W. E. Chapman for the purpose of foreclosing a labor lien upon the crop of barley, and it appears that Chapman prosecuted his action to a judgment and enough of the barley was sold to satisfy his claim. John W. Sommerville, as executor, the Averill Machinery Company and the Garden City Feeder Company joined in a cross-complaint in said action for the purpose of foreclosing their chattel mortgages, and to secure judgment against the Vollmer-Clearwater Company for the value of the barley not sold to satisfy the claim of Chapman which they alleged had been converted by the last-mentioned corporation. The Vollmer-Clearwater Company answered, denying that the mortgages above mentioned covered any grain stored in their warehouse, except ninety sacks, and denying conversion of any grain to their own use.

The Vollmer-Clearwater Company claim that in the spring of 1913 F. W. Rounds made an agreement with his son, C. W. Rounds, whereby in consideration for his work and labor in planting and caring for the crop the said C. W. Rounds would be given an undivided one-half interest in the crop raised on the summer-fallowed portion of the above-described land, which would be about one-half thereof; that when the grain was delivered, warehouse receipts were issued to C. W. Rounds for his half of the barley raised on the summer-fallowed land; that the company purchased the C. W. Rounds grain and applied the proceeds to the payment of certain indebtedness due the company from F. W. Rounds, C. W. Rounds and R. M. Rounds, a brother of C. W. Rounds, and that the mortgages above mentioned did not cover the interest of C. W. Rounds in said crop.

The only evidence introduced by the Vollmer-Clearwater Company in support of their claim of ownership in C. W. Rounds is contained in the following testimony of R. M. Rounds, a son of F. W. Rounds and brother of C. W. Rounds:

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“Q. Did you hear any arrangement or agreement or understanding between your father and C. W. Rounds relative to this Sommerville land?

“A. I recollect that my father and C. W. and myself was at the place, and that they were talking about an agreement for an undivided half of the crop.

“Q. On the summer-fallow land?

“A. Land they were working together.

“Q. How much was your father to receive out of it?

“A. One-half.

“Q. And how much was C. W. Rounds to receive?

“A. One-half.”

It does not appear when this alleged conversation took place. It will be noted that the alleged agreement was not confined to summer-fallow land, but to all the land F. W. Rounds was working. For anything that appears in the evidence the agreement may have been made after the mortgages were given. Witness George Emick testified that he lived on the Rounds land that season; that he prepared the land for seeding and did a portion of the seeding, and that so far as he knew C. W. Rounds did not do any work on the grain at all. We do not think the testimony of R. M. Rounds would sustain a finding of ownership of any part of the grain in C. W. Rounds.

Upon the entire evidence the court was amply justified in finding that the mortgages above mentioned were valid and subsisting liens upon the crop of barley, and that the Vollmer-Clearwater Company wrongfully and unlawfully took and converted to their own use a portion of the crop.

Appellant also contends that the three chattel mortgages above mentioned refer to the same undivided half of the grain, and that it was the intention of the mortgagor to leave an undivided half of the crop unencumbered. This contention cannot be sustained. In terms each mortgage covers an undivided half of the whole crop, and it is impossible to designate a particular undivided interest as distinguished from another undivided interest in the same property. Each mortgage covered an undivided half interest in the entire crop,

and the question of priority is determined by the date of execution and record.

It cannot be determined from the evidence how the trial court arrived at the fact that 616 sacks of barley were converted. According to the evidence there were 540 sacks converted by the Vollmer-Clearwater Company, with ninety sacks still remaining in its warehouse to be delivered to the persons entitled thereto. The 540 sacks converted weighed 63,331 lbs., leaving 10,684 lbs. still in the company's warehouse.

There remains only to consider the proper measure of damages to be applied for the conversion of the grain. The court found that at the time of conversion the value of the grain was \$1 per cwt., and that the highest market value of the said grain between the time of conversion and the time of trial was \$1.55 per cwt. The admission of evidence as to the highest market value of grain between the date of conversion and the date of trial is specified by appellant as error.

Sutherland on Damages, 4th ed., section 1109, says: "The general rule of damages in England and in this country is the market value of the property at the time and place of conversion if it had such value; and in America, at least, interest is generally added as a matter of law. This rule is based on the assumption that such value is beneficially equal to the property itself, and that interest compensates for the delay in payment of that value and the value of the use of the property."

In 8 R. C. L., at p. 537, the author of the text states: "The right of interest, as a part of the damages, in actions of trover and trespass *de bonis asportatis*, was given first in England by Stat. 3 & 4 Wm. IV; and this right has been, in general, recognized in this country, not so much on the theory that interest as such is due, but rather that the plaintiff is entitled to the fixed sum of money or definite money value of property converted, and the jury may give as damages an amount equal to interest on such value."

The rule of damages quoted from Sutherland is the correct rule to apply to this case. (*Continental Divide Min. Inv. Co. v. Bliley*, 23 Colo. 160, 46 Pac. 633; *Unfried v. Libert*, 20 Ida.

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708, at 729, 119 Pac. 885; *Unfried v. Libert*, 23 Ida. 603, 131 Pac. 660; *Sears v. Lydon*, 5 Ida. 358, 49 Pac. 122; *Cowden v. Finney*, 9 Ida. 619, 75 Pac. 765; *Cowden v. Mills*, 9 Ida. 626, 75 Pac. 766; *Hart v. Brierley*, 189 Mass. 598, 76 N. E. 286; *Mechanics' etc. Bank v. Farmers' etc. Bank*, 60 N. Y. 40; *Simpson v. Alexander*, 35 Kan. 225, 11 Pac. 171; *Hofreiter v. Schwabland*, 72 Wash. 314, 130 Pac. 364.)

The rule of the highest intermediate value contended for by respondents seems to have been limited to those cases of conversion where the property was of fluctuating value. The rule seems to have arisen out of conversion and detention of stocks, and to have been applied to such transactions. We do not find that this rule has been applied as a measure of damages for conversion of personal property such as was converted in the case at bar.

The trial court failed to find the date of conversion. This is necessary in order to fix the time from which interest is to be computed.

This cause is remanded to the trial court with instructions to determine the date of conversion and to modify the findings of fact and conclusions of law so as to give the cross-plaintiffs judgment for the amount of grain converted at the market price of such grain at the time and place of conversion, with interest thereon to the date of entering the judgment, and to enter a decree of foreclosure against the ninety sacks remaining in the possession of the Vollmer-Clearwater Company. No costs awarded on this appeal.

Budge, C. J., and Morgan, J., concur.

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Argument for Appellant.

(June 30, 1917.)

H. S. MILNER, Respondent, v. C. W. PELHAM, Appellant.

[166 Pac. 574.]

SALE OF VOID COUNTY WARRANTS—FAILURE OF CONSIDERATION—IMPLIED PROMISE ON PART OF SELLER TO REPAY PURCHASER.

1. Where one purchases county warrants from the payee thereof, which warrant issue is thereafter held by the district court, in a proper action, to be null and void, and the county treasurer enjoined from paying the same, and the order of the county commissioners, directing the auditor to issue the warrants, is reversed and vacated, there is a total failure of consideration from the seller of such warrants, since the purchaser did not in fact receive the county warrants he supposed he was buying, but only pieces of worthless paper.

2. Whenever one party has in his possession money which in equity and good conscience belongs to another, the law raises a promise upon the part of the first party to repay such money.

3. *Held*, that under the facts and law of this case, the trial court committed no error in instructing the jury to return a verdict for respondent.

APPEAL from the District Court of the Eighth Judicial District, for Kootenai County. Hon. R. N. Dunn, Judge.

Action to recover for money had and received. Directed verdict for plaintiff. *Affirmed*.

C. H. Potts, for Appellant.

There is no implied warranty on the part of one who sells county warrants or other securities that the same are valid or were issued by proper legislative authority. The doctrine of *caveat emptor* applies.

“There is an implied warranty of genuineness on a sale of notes, bonds, or other securities. There is, however, no implied warranty that municipal officers who issued the securities sold have lawful authority to do so.” (35 Cyc. 396; *Otis v. Cullum*, 92 U. S. 447, 23 L. ed. 496; *Sutro v. Rhodes*, 92 Cal. 117, 28 Pac. 98; *Crocker-Woolworth Nat. Bank v.*

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Nevada Bank, 139 Cal. 564, 96 Am. St. 169, 73 Pac. 456, 63 L. R. A. 245; *Harvey v. Dale*, 96 Cal. 160, 31 Pac. 14; *O'Sullivan v. Griffith*, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323; *White v. Robinson*, 50 Mich. 73, 14 N. W. 704; *Christy v. Sullivan*, 50 Cal. 337.)

Black & Wernette, for Respondent.

Respondent in the case at bar did not get county warrants which he bargained for, but only got worthless similitudes of such warrants, which were of no value whatever, for the money he paid for them, which were invalid when sold by appellant to respondent. (*Pugh v. Moore*, 44 La. Ann. 209, 10 So. 710; *Rogers v. Walsh*, 12 Neb. 28, 10 N. W. 467; *Walsh v. Rogers*, 15 Neb. 309, 18 N. W. 135; *Terry v. Bissell*, 26 Conn. 23; *Levy v. First Nat. Bank*, 27 Neb. 557, 43 N. W. 354.)

An action for money had and received will lie to recover money paid by plaintiff to defendant for a consideration which has wholly failed, unless the failure of consideration is due to some fault on the part of plaintiff himself. (*Keller v. Hicks*, 22 Cal. 457, 83 Am. Dec. 78; *Meyer v. Richards*, 163 U. S. 385, 16 Sup. Ct. 1148, 41 L. ed. 199; Benjamin on Sales, 4th Am. ed., secs. 600, 607; *Utley v. Donaldson*, 94 U. S. 29, 24 L. ed. 54; *Flandrow v. Hammond*, 148 N. Y. 129, 42 N. E. 511; *Wood v. Sheldon*, 42 N. J. L. 421, 36 Am. Rep. 523.)

If a warrant was sold which was null and void, the vendor would be liable to refund the consideration to the vendee if the instrument were not valid and legal according to its purpose. (1 Daniel on Negotiable Instruments, 6th ed., 543.)

BUDGE, C. J.—Respondent brought this action against appellant to recover the sum of \$704, which he had theretofore paid appellant for four Kootenai county warrants, drawn on the current expense fund of said county. The \$700 represented the face value of the warrants and the \$4 the accrued interest.

Respondent alleged in his complaint that he had received the warrants in good faith, and thought that they were valid

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and could and would be paid out of the current funds of Kootenai county, but when he had received the warrants, as aforesaid, an action was commenced in the district court in and for Kootenai county, as a result of which action the warrants were declared and held to be null and void; that the treasurer of the county was enjoined from paying the same and the order of the county commissioners, which had theretofore been entered, directing the auditor to issue the warrants was reversed and vacated; that thereafter he requested appellant to repay the sum paid for the warrants, which appellant refused to do; that by reason of the warrants being void there was a total failure of consideration from the appellant to respondent for the said sum of \$704; and that for this reason appellant impliedly agreed and promised to pay respondent the said sum, together with interest thereon at the rate of seven per cent per annum from April 7, 1914, that being the date that the warrants were sold and transferred by appellant to respondent.

A second count is set up in the complaint in substance containing the same allegations as the first, with an additional allegation that at the time of the sale appellant had orally guaranteed that the warrants were good and valid.

A demurrer was interposed to the complaint, which was overruled and appellant filed an answer, specifically denying the allegations of the complaint and setting up as an affirmative defense that at the request of respondent he had sold all of his right, title and interest in and to the warrants to respondent for the sum mentioned in the complaint; that upon the payment of the sum appellant assigned each of the warrants to respondent by writing his name across the back thereof; that his signature was placed on the back of said warrants for the sole purpose of assigning his interest in them to respondent, which respondent knew; that before purchasing said warrants respondent made an investigation on his own behalf of the conditions upon which they had been issued and was fully apprised of all the facts in connection with them, and relied upon his own investigation and not upon any representation or statement of appellant or upon the sig-

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nature of appellant written upon the back of them; that respondent had equal opportunity and means of knowledge with appellant to ascertain whether or not the warrants were good and valid and were legal obligations of said Kootenai county, and ought to be estopped from stating or claiming that he purchased them because of any representations or statements of appellant with reference thereto, or because of appellant signing them and writing his name on the back thereof.

The facts, so far as material, are as follows: Some time prior to the 7th day of April, 1914, the board of county commissioners of Kootenai county had undertaken to purchase, for the use of the county assessor, certain plots and estimates of timber, based upon cruises of a portion of a former Indian reservation in said county, and in payment therefor had ordered the auditor to issue county warrants, drawn on the current expense fund of the county, in favor of appellant. On the 7th day of April, 1914, appellant sold, assigned and transferred the warrants to the respondent and received therefor \$704, said sum being the face value of the warrants plus the accrued interest, and at the time indorsed his name on the back of each of said warrants. Thereafter an appeal was taken from the order of the board of county commissioners, directing the warrants to be drawn, and the district court, after hearing said appeal, decreed the warrants to be null and void, upon the ground that they were illegally issued. The court instructed the jury to find a verdict in favor of the respondent, which it did and judgment was entered thereon.

This appeal is from the judgment. Appellant's brief contains seven assignments of error. The solution of the whole case depends upon the questions raised by the 4th and 5th assignments of error, which are in substance that the court erred in instructing the jury to find a verdict for respondent. The sole question presented is, whether or not, under the circumstances of their sale, the warrants were a good consideration for the money which respondent paid for them.

The evidence shows that there was nothing about the warrants in question to distinguish them from any other Kootenai county warrants, drawn on the current expense fund. The

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question of warranty or guaranty does not enter into the case as disclosed by the evidence. Respondent purchased Kootenai county warrants but he did not receive Kootenai county warrants, what he did receive was merely four pieces of worthless paper, on their faces similar in all respects to valid Kootenai county warrants. Such was the holding in *Rogers v. Walsh*, 12 Neb. 28, 10 N. W. 467. The view there taken was affirmed in the same case on another appeal. (*Walsh v. Rogers*, 15 Neb. 309, 18 N. W. 135.) These cases have been followed as authority and quoted with approval in *Logan County Bank v. Farmers' Nat. Bank* (Okl.), 155 Pac. 561-563; *Martin v. Hutton*, 90 Neb. 34, 132 N. W. 727, 36 L. R. A., N. S., 602; *Bank of Commerce v. Ruffin*, 190 Mo. App. 124, 175 S. W. 303-307, and in the well-considered case of *Meyer v. Richards*, 163 U. S. 385, 16 Sup. Ct. 1148, 41 L. ed. 199. The latter case distinguishes the case of *Otis v. Cullum*, 92 U. S. 447, 23 L. ed. 496, upon which appellant seems largely to rely.

The same principle was applied at an early day by the California court in the case of *Kreutz v. Livingston*, 15 Cal. 344. The latter case has been followed in *Dashaway Assn. v. Rogers*, 79 Cal. 211, 21 Pac. 742; *Ehrman v. Rosenthal*, 117 Cal. 491, 49 Pac. 460; *Gregory v. Clabrough's Exrs.*, 129 Cal. 475, 62 Pac. 72.

The principle involved is the one which lies at the very foundation of all quasi-contractual obligations, and is based primarily upon questions of equity and good conscience. Whenever one party has in his possession money which in equity and good conscience belongs to another, the law raises a promise upon his part to repay it. The principle is well stated in the portion of the opinion in *Kreutz v. Livingston*, *supra*, which quotes in part from the opinion of Parker, C. J., in *Hall v. Marston*, 17 Mass. 575, as follows:

“The principle of this doctrine is reasonable, and consistent with the character of the action of assumpsit for money had and received. There are many cases in which that action is supported without any privity between the parties other than what is created by law. Whenever one man has in his hands the money of another, which he ought to pay over, he is liable

Points Decided.

to this action, although he has never seen or heard of the party who has the right. When the fact is proved that he has the money, if he cannot show that he has legal or equitable ground for retaining it, the law creates the privity and the promise."

It is clear from the facts and the foregoing authorities that the trial court committed no error in instructing the jury in this case to return a verdict for respondent.

We have examined the other assignments of error and find them without merit. The judgment is therefore affirmed. Costs awarded to respondent.

Morgan and Rice, JJ., concur.

(July 2, 1917.)

HORACE M. DAVENPORT, MILTON J. FLOHR, CHARLES W. BETTS, CHARLES F. ASP, CHARLES W. BETTS, Administrator of the Estate of BARRY N. HILLARD, Deceased, WILLIAM M. CLARK, THOMAS KEELY, BEN STANLEY REVETT, JOHN H. WOURMS and CONSOLIDATED INTERSTATE-CALAHAN MINING COMPANY, a Corporation, Respondents, v. PATRICK BURKE, Appellant.

[167 Pac. 481.]

CONFLICT IN EVIDENCE — PRINCIPAL AND AGENT — FRAUD BY AGENT — BENEFITS RETAINED BY PRINCIPAL — CONSTRUCTIVE TRUSTS.

1. In a suit in equity, as well as in an action at law, a finding of fact made by the trial judge, who has had the benefit of observing the demeanor of witnesses upon the stand and of listening to their testimony, will not be disturbed, because of conflict, if the evidence in support of the finding, if uncontradicted, is sufficient to sustain it.

2. The fraud of an agent is within the course of his employment where, in committing it, he is endeavoring to promote his principal's business within the scope of the actual or apparent authority conferred upon him for that purpose.

Argument for Appellant.

3. Acts of fraud by an agent, committed in the course of his employment, are binding on his principal, even though the principal did not in fact know of or authorize their commission.

4. A principal who retains benefits derived from the fraudulent conduct of his agent is chargeable with the instrumentality employed by the latter in carrying out the fraudulent purpose, and will not be permitted to disclaim responsibility and retain the fruits of the fraudulent transaction.

5. Constructive trusts are raised by equity for the purpose of working out right and justice, where there was no intention of the trustee to create such a relation. Where a party obtains the legal title to property by fraud, violation of confidence, or of a fiduciary relation, or in any other unconscientious manner, so that he cannot equitably retain it, because it really belongs to another, equity will impress a constructive trust upon it in favor of the one who in good conscience is entitled to it, and will recognize him as the beneficial owner.

[As to effect of principal's retention of benefit of loan procured by agent without authority, see notes in *Ann. Cas.* 1913E, 1115; *Ann. Cas.* 1916A, 184.]

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. John M. Flynn, Presiding Judge.

Suit to quiet title and for injunction. Judgment for plaintiffs and cross-defendant. *Reversed.*

Fred L. Tiffany and Robertson & Miller, for Appellant.

A principal cannot claim the fruits of fraud perpetrated by his agent, whether he knew of the fraud or not, and even when the agent acts within the scope of his authority and is instructed to make no false statements. (*Nelson v. Tille Trust Co.*, 52 Wash. 258, 100 Pac. 730; *Griswold v. Gebbie*, 126 Pa. St. 353, 12 Am. St. 878, 17 Atl. 673; *Salina Merc. Co. v. Stiefel*, 82 Kan. 7-14, 107 Pac. 774; *Freeman v. F. P. Harbaugh Co.*, 114 Minn. 283, 130 N. W. 1110; *Dresher v. Becker*, 88 Neb. 619, 130 N. W. 275; *Reed v. Halloway* (Tex. Civ.), 127 S. W. 1189; 20 Cyc. 85.)

Where a trustee, agent or employee cannot purchase in his behalf as against his principal or *cestui que trust*, he

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cannot purchase for a third person. (*Michoud v. Girod*, 4 How. (U. S.) 504, 11 L. ed. 1077.)

James E. Gyde, Frank H. Graves and W. G. Graves, for Respondents.

In a suit of equity, as well as in an action at law, the findings of a trial judge will not be disturbed where there is a conflict in the evidence and the witnesses were produced in court. (*Stuart v. Hauser*, 9 Ida. 53, 72 Pac. 719; *Morrow v. Matthew*, 10 Ida. 423, 79 Pac. 196; *Huften v. Huften*, 25 Ida. 96, 136 Pac. 605; *Cameron Lbr. Co. v. Stack-Gibbs Lbr. Co.*, 26 Ida. 626, 144 Pac. 1114; *Darry v. Cox*, 28 Ida. 519, 155 Pac. 660; *Jensen v. Bumgarner*, 28 Ida. 706, 156 Pac. 114; *Wolf v. Eagleson*, 29 Ida. 177, 157 Pac. 1122.)

When an agent undertakes to represent two principals, and their interests conflict in the subject matter of the agency, if both are equally innocent there is no rule of reason or law which permits one principal to be charged with all the consequences of the agent's double dealing, and the other to obtain all the benefits of what the agent did. (*Kennedy v. Green*, 3 Mylne & K. 699, 40 Eng. Reprint, 399; 2 R. C. L. 965; *Benedict v. Arnoux*, 154 N. Y. 715, 49 N. E. 326; *Melms v. Pabst Brg. Co.*, 93 Wis. 153, 57 Am. St. 899, 66 N. W. 518.)

Where there are equal equities, the first in order of time shall prevail. (1 Pomeroy, Eq. Jur., 3d ed., 413.) Where there is equal equity, the law must prevail. (1 Pomeroy Eq. Jur., 3d ed., 417.)

MORGAN, J.—This case has heretofore been before this court upon appeal from a judgment on the pleadings. (*Davenport v. Burke*, 27 Ida. 464, 149 Pac. 511.) That judgment was reversed and the cause remanded for further proceedings. Whereupon appellant, defendant in the court below, applied for and procured an order of the trial court permitting him to file a third amended answer and cross-complaint and to make the Consolidated Interstate-Calahan

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Mining Company, a corporation, hereinafter referred to as the mining company, a party. The answer and cross-complaint was filed and the plaintiffs and the mining company jointly answered the cross-complaint. Upon the issues framed by the complaint, the substance of which will be found in the opinion in *Davenport v. Burke, supra*, the third amended answer and cross-complaint and the answer to the cross-complaint, a trial was had before the court without a jury, which resulted in judgment for the plaintiffs and the mining company, from which the defendant has appealed.

In June, 1912, and prior thereto, Horace M. Davenport, Milton J. Flohr, Charles W. Betts, Charles F. Asp, William M. Clark, Thomas Keely, Ben Stanley Revett and the estate of Barry N. Hillard, deceased, of which Charles W. Betts was administrator, hereinafter referred to as the original owners, owned certain mining claims located in Shoshone county, title to which is the subject of this action.

Some time prior to June, 1912, negotiations were entered into between appellant and these original owners which resulted in a contract being executed, dated June 3, 1912, whereby appellant procured an option to purchase the mining claims for the sum of \$160,000. This contract, for the purpose of convenience, was expressed in two papers. One providing for the payment of \$115,000 to certain of the owners, the other of \$45,000 to certain others, and by the terms thereof \$16,000 was to be due and payable on or before December 3, 1912, \$32,000 on or before April 3, 1913, \$32,000 on or before October 3, 1913, and \$80,000 on or before April 3, 1914. By the terms of the contract appellant was to be let into immediate possession of the property; however, it appears from the record, as a matter of fact, he was already in possession and had been for sometime prior to its execution. It was further provided that appellant should have the right to mine, extract and ship such ore as was encountered during the course of development work, not lying or contained within the boundaries of the underground works as the same existed at the time of the execution of the agreement, but that no right was given him to stope upon the ore bodies

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discovered, or thereafter to be discovered. Time was made the essence of the agreement, and it was provided that if appellant should fail to make the payments or any of them when due, the contract should be void and the amounts theretofore paid should be retained by the original owners and that appellant's right to possession of the property should cease.

On the 4th day of December, 1912, appellant having failed to fully make the first payment, the owners declared his rights forfeited and entered into a contract with respondent, John H. Wourms, similar in all important particulars to that theretofore entered into with appellant, except that the first payment of \$16,000 was made immediately upon the signing of the agreement and the subsequent payments were to be made on or before the 3d day of August, 1913, the 3d day of December, 1913, and the 3d day of June, 1914, respectively. The first payment, as well as those subsequently falling due, was made by Wourms with money furnished him for that purpose by the mining company. The original owners conveyed title to the property by deed to Wourms and he, subsequently, deeded it to the mining company.

Appellant's assignments of error, which are numerous, will not be separately discussed. He makes two principal contentions, a consideration of which, we believe, will be decisive of this case:

(1) That it was orally agreed between himself and the original owners that the date of his first payment should be February 19, 1913, and that he was to be permitted to extract and ship ore from the mine other than in the course of development work; that through a fraud, perpetrated upon him by and on behalf of the original owners, the date of his first payment was expressed in the written contract as December 3, 1912, and he was prohibited from extracting and shipping any ore, except that necessary to be removed in legitimately exploring and developing the mine.

(2) That Wourms, who was his attorney, regularly employed to safeguard his interests under the contract, acting for and in collusion with the mining company, defrauded and

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misled him into allowing his rights to be forfeited and then, in hostility to him, purchased the property.

It may be said, with respect to appellant's contention first above stated, that the trial court found the facts against him and, while there is sharp conflict in the evidence upon that point, we are governed by a well-established rule to the effect that in a suit in equity, as well as in an action at law, a finding of fact made by the trial judge, who has had the benefit of observing the demeanor of witnesses upon the stand and of listening to their testimony, will not be disturbed, because of conflict if the evidence in support of the finding, if uncontradicted, is sufficient to sustain it. (*Stuart v. Hauser*, 9 Ida. 53, 72 Pac. 719; *Morrow v. Matthew*, 10 Ida. 423, 79 Pac. 196; *Huften v. Huften*, 25 Ida. 96, 136 Pac. 605; *Cameron Lbr. Co. v. Stack-Gibbs Lbr. Co.*, 26 Ida. 626, 144 Pac. 1114; *Darry v. Cox*, 28 Ida. 519, 155 Pac. 660; *Jensen v. Bumgarner*, 28 Ida. 706, 156 Pac. 114; *Wolf v. Eagleson*, 29 Ida. 177, 157 Pac. 1122.) Applying this rule, an examination of the record discloses that there is sufficient evidence to sustain the action of the trial judge in finding, as a fact, that the terms and conditions of the oral agreement between the parties were incorporated in the written contract.

Upon the second point, the trial judge found that respondent, Wourms, was, in the year 1912, and had been for some time prior thereto, a practicing attorney at law in the state of Idaho and was well known to and upon friendly terms with appellant; that on or about the 18th day of November, 1912, appellant went from Wallace, Idaho, to Spokane, Washington, for the purpose of employing an attorney to represent him in the controversy between himself and the original owners with reference to the contract, as before stated; that after his arrival in Spokane he was approached by Wourms, to whom he stated what his business there was and the claims he was making in regard to the terms of the contract and his rights thereunder; that upon his stating the fact that he was in Spokane for the purpose of securing an attorney, Wourms told him that he and appellant had always been friends and that he could and would represent him in securing the rights

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he claimed; that appellant then fully disclosed the claims he was making with reference to his rights as against the original owners and made a full and complete statement of all the alleged terms of the contract; that he thereupon employed Wourms to act as his attorney in the matter and paid him a retaining fee and Wourms accepted the employment and the fee and undertook to act as appellant's attorney; that on November 19, 1912, Wourms wrote a letter to the Graeselli Chemical Company of Park City, Utah, stating that appellant had employed him as his attorney to straighten out his affairs, and wherein he asked for a copy of a letter sent to appellant by that company and which appellant claimed had been intercepted by respondent, Betts; that on the 23d day of November, 1912, Wourms, as appellant's attorney, prepared a notice to the original owners, which was transmitted to them, wherein he demanded a bond or option to purchase the mining property on the terms and conditions agreed upon between them during their negotiations prior to the 3d day of June, 1912, and stating that unless they complied with his demand within fifteen days from the date of the notice he would institute suit for specific performance and for damages sustained by him through their failure to live up to the agreement; that appellant had several conversations and consultations with Wourms at different times with reference to his claims under the contract; that on about the 16th day of December, 1912, Wourms informed appellant that he had been, for a long period of time prior thereto, in the employ of the mining company, that the company was desirous of purchasing the property in question and that he, Wourms, would have to represent the mining company with relation to the purchase and could not further represent appellant in the matter.

In view of this finding of facts, which is based upon uncontradicted evidence, the conclusions of law and judgment in this case are erroneous.

The trial judge further found, as a fact, that Wourms had been attorney for the mining company for more than one year prior to November, 1912, and that at no time during these

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transactions did it have any knowledge or notice of the relations between Wourms and appellant, but supposed that Wourms was acting as its counsel in relation to the proposed purchase of the property unembarrassed by any conflicting professional engagements.

The evidence tending to support the finding that the mining company had no notice that Wourms was acting as attorney for appellant consists of the testimony of its then general manager who stated he had no information of the fact and did not suspect, at the time Wourms was acting for the mining company in negotiating for the option, that he had any professional relation with appellant, and the first time he knew of it was in the courtroom while the case was on trial.

Whether this testimony is sufficient to sustain the finding that the mining company had no notice of the relation of attorney and client existing between appellant and Wourms, other than that derived from the knowledge of Wourms, we do not deem it necessary to decide.

The uncontradicted evidence shows that Wourms prevailed upon appellant, who was uneducated, never having gone to school a day in his life, and signed his name for the first time after he was thirty years old, and was, because of his lack of skill and learning, greatly in need of the services of a conscientious and competent attorney, to not employ counsel other than himself; that during all, or almost all, the time he was so employed he was negotiating with the original owners for the purchase, in his own name, of the mining claims upon which appellant had a valid written contract or option, which, by its terms, would expire on December 3, 1912; that on November 23, 1912, he advised and procured appellant to issue a notice to the original owners granting them fifteen days within which to conform to the agreements it was contended they had made with him, well knowing that, before the expiration of that time, the written option to purchase would expire, thus permitting him to avail himself of the negotiations he was making with the owners for the purchase of the property by himself for the mining company.

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That in procuring this title, with the mining company's money and for its use and benefit, Wourms acted as its agent cannot be doubted; that he was directed by his principal late in November or early in December, 1912, to procure the title for it is made manifest by the record, and that while so doing, and acting within the scope of his agency, he defrauded appellant, lulled his mind into a sense of confidence and repose, and, to the end that the fraud might be perpetrated, caused him to permit his option to expire without seeking the guidance of other counsel or otherwise protecting himself is equally clear. "It may be stated broadly that the tort of an agent is within the course of his employment where the agent in performing it is endeavoring to promote his principal's business within the scope of the actual or apparent authority conferred upon him for that purpose." (2 C. J. 853.)

A rule of law, applicable to this case, is correctly stated in 2 C. J. 849, as follows: "Acts of fraud by the agent, committed in the course or scope of his employment, are also binding on the principal, even though the principal did not in fact know of or authorize the commission of the fraudulent acts. . . . " (See, also, *Bank of Commerce v. Hoeber*, 88 Mo. 37, 57 Am. Rep. 359; *Haskell v. Starbird*, 152 Mass. 117, 23 Am. St. 808, 25 N. E. 14; *Fifth Avenue Bank v. Forty-second St. etc. Ry. Co.*, 137 N. Y. 231, 33 Am. St. 712, 19 L. R. A. 331.)

In the case last above cited, the court, quoting from Story on Agency, 9th ed., sec. 452, states the rule as follows:

"The principal is to be held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances, or misfeasances, and omissions of duty, of his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them.' "

The supreme court of Nebraska, in case of *Dresher v. Becker*, 88 Neb. 619, 130 N. W. 275, said: "A principal who

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retains benefits derived from the fraudulent conduct of his agent is chargeable with the instrumentality employed by the latter in carrying out the fraudulent purpose." He will not be permitted to disclaim responsibility and retain the benefits of the fraudulent transaction. (*Nelson v. Title & Trust Co.*, 52 Wash. 258, 100 Pac. 730; *Western Mfg. Co. v. Cotton & Long*, 126 Ky. 749, 104 S. W. 758, 12 L. R. A., N. S., 427; *Rhoda v. Annis*, 75 Me. 17, 46 Am. Rep. 354; *D. Sullivan Co. v. Ramsey* (Tex. Civ.), 155 S. W. 580.)

The supreme court of Oregon, in *Clough v. Dawson*, 69 Or. 52, 138 Pac. 233, quoting from 1 Pom. Eq. Jur., 3d ed., sec. 155, points the way to a remedy in this case, as follows: .

"Constructive trusts are raised by equity for the purpose of working out right and justice, where there was no intention of the party to create such a relation, and often directly contrary to the intention of the one holding the legal title. . . . If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner."

The judgment is reversed with directions to the trial court to vacate and set aside the injunction heretofore issued and to enter a decree: 1. Awarding immediate possession of the lands and premises described in the complaint and in the third amended answer and cross-complaint, together with the appurtenances thereunto belonging, to the appellant; 2. Fixing a reasonable time, to commence to run upon appellant being placed in full possession of the property, within which he shall pay to the clerk of the district court, for the use and benefit of the mining company, the sum of \$160,000 less the sum of \$175, which latter amount the trial court found he has heretofore paid to the original owners upon his contract of option to purchase; 3. Requiring Consolidated Interstate-

Points Decided.

Calahan Mining Company, a corporation, upon payment to it, or to the clerk of the district court for its use and benefit, the sum of \$160,000, less the sum of \$175, to make, execute and deliver to the clerk of the court a deed conveying the full title to the lands and premises described in the complaint and in the third amended answer and cross-complaint, together with the appurtenances thereunto belonging to appellant, and that should said company fail or refuse to make such deed, then the trial court shall appoint a commission to make a good and sufficient deed so conveying said property.

Costs are awarded to appellant.

Budge, C. J., and Rice, J., concur.

Petition for rehearing denied.

(July 2, 1917.)

SAINT MICHAEL'S MONASTERY, a Corporation, Plaintiff, v. EDGAR C. STEELE, as Judge of the Second Judicial District of the State of Idaho, and COTTON-WOOD WATER & LIGHT COMPANY, LIMITED, a Corporation, Defendants.

[167 Pac. 349.]

MANDAMUS—NOT AVAILABLE WHEN.

1. The writ of mandate may be employed to require a court to enter a judgment in the exercise of its jurisdiction, but not to control its discretion or direct its decision.

2. A party considering himself aggrieved by the final judgment of a district court has his plain, speedy and adequate remedy at law by appeal to this court, and where there is such remedy, the writ of mandate is not available.

[As to what the writ of *mandamus* is and when it is allowable, see note in 89 *Am. Dec.* 1728.]

PETITION for writ of mandate. Alternative writ quashed and peremptory writ denied.

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J. B. Hawley, Jas. De Haven and J. F. Ailshie, for Plaintiff.

The lower court cannot apportion costs in an action to quiet title to real estate. (Sec. 4903, Rev. Codes.)

All the material issues in this case were decided in favor of the defendant and that this is an action to quiet title to real estate. The supreme court of California in the case of *Sierra Union Water & Mining Co. v. Wolff*, 144 Cal. 430, 77 Pac. 1038, passed upon a statute identical with ours. (*Hoyt v. Hart*, 149 Cal. 722, 87 Pac. 569, 572; *Imperial Water Co. v. Wores*, 29 Cal. App. 253, 155 Pac. 124.)

The lower court has no discretion in this matter; we are entitled to costs as a matter of right. The case comes within provisions of subd. 5 of sec. 4901, Rev. Codes. Our client being the defendant is, by provisions of sec. 4903, given the same rights as the plaintiff where it has recovered a judgment in such an action. (*Ebner Gold Min. Co. v. Alaska-Juneau Gold Min. Co.*, 210 Fed. 599, 127 C. C. A. 235; *Weller v. Brown*, 25 Cal. App. 216, 143 Pac. 251; *F. A. Hihn Co. v. City of Santa Cruz*, 24 Cal. App. 365, 141 Pac. 391.)

G. W. Tannahill, for Defendant.

In this kind of an action, where both parties demand affirmative relief by affirmative defenses or cross-complaint, the matter of recovery of costs rests in the discretion of the lower court, and unless the lower court abuses that discretion, its judgment and decision will not be disturbed. (*Campbell v. First Nat. Bank*, 13 Ida. 95, 88 Pac. 639; *Simmons v. Simmons*, 23 Ida. 485, 130 Pac. 784; *Fix v. Gray*, 26 Ida. 19, 140 Pac. 771; *Wolfe v. Ridley*, 17 Ida. 173, 104 Pac. 1014, 20 Ann. Cas. 39; *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. 569.)

Then if it be a legal question upon which courts might differ, as it undoubtedly is, it is a matter which could be corrected on appeal, and is not a case for application direct to this court for an alternative writ of mandate.

MORGAN, J.—This is an original proceeding wherein was sought and procured an alternative writ of mandate directed

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to the defendant commanding him to make, sign and file findings of fact, conclusions of law and decree in case of *Cottonwood Water & Light Company, Limited, a Corporation, v. Saint Michael's Monastery, a Corporation*, heretofore decided by this court, 29 Ida. 761, 162 Pac. 242, and remanded with instructions to make findings and conclusions and enter a decree in conformity to the views therein expressed, or that he show cause, at a time and place stated in the writ, why he should not have done so. The defendant made answer and the case was submitted to the court upon the complaint, the answer and the affidavit of defendant's counsel.

It appears that after receiving our *remittitur*, in the case above mentioned, the defendant, as judge of the district court of the second judicial district, made findings of fact, conclusions of law and entered a decree in all particulars satisfactory to the plaintiff herein, except that no costs accruing in the district court were awarded. The purpose of this proceeding is to procure a correction of the decree in that particular.

The writ of mandate may be employed to require a court to enter a judgment in the exercise of its jurisdiction, but not to control its discretion or direct its decision. (*Board of Commrs. v. Mayhew*, 5 Ida. 572, 51 Pac. 411; *Pyke v. Steunenberg*, 5 Ida. 614, 51 Pac. 614; *Connolly v. Woods*, 13 Ida. 591, 92 Pac. 573; *Olden v. Paxton*, 27 Ida. 597, 150 Pac. 40; *Blackwell Lumber Co. v. Flynn*, 27 Ida. 632, 150 Pac. 42.)

A party considering himself aggrieved by the final judgment of a district court has his plain, speedy and adequate remedy at law by appeal to this court (Rev. Codes, sec. 4807, as amended by Sess. Laws 1915, p. 193), and where there is such remedy, the writ of mandate is not available. (Rev. Codes, sec. 4978; *Wright v. Kelley*, 4 Ida. 624, 43 Pac. 565; *Bellevue Water Co. v. Stockslager*, 4 Ida. 636, 43 Pac. 568; *State v. Whelan*, 6 Ida. 78, 53 Pac. 2; *Fraser v. Davis*, 29 Ida. 70, 156 Pac. 913, 158 Pac. 233; *People v. Judges of Ulster*, 1 Coleman's Cases (N. Y.), 118, *State v. Judge of Kenosha Circuit Court*, 3 Wis. 809; *Haney v. Muskegon County Circuit Judge*, 101 Mich. 392, 59 N. W. 662.)

Opinion of the Court—Budge, C. J.

The alternative writ is quashed and the peremptory writ denied. Costs are awarded to defendant.

Rice, J., concurs.

Budge, C. J., dissents.

Petition for rehearing denied.

(July 2, 1917.)

CHARLES J. KINSOLVING, Respondent, v. **MILWAUKEE LUMBER COMPANY**, a Corporation, Appellant.

[166 Pac. 567.]

FINDINGS OF FACT—SUPPORTED BY EVIDENCE—AFFIRMED.

Held, where in an action upon an express contract for the payment of money, the trial court finds all of the facts in favor of plaintiff, and the findings are sustained by the evidence, the judgment for plaintiff will be affirmed.

APPEAL from the District Court of the Eighth Judicial District, for Benewah County. Hon. John M. Flynn, Judge.

Action on contract. Judgment for plaintiff. *Affirmed*.

E. N. La Veine, for Appellant.

R. B. Norris and Frank L. Moore, for Respondent.

Counsel cite no authorities on point decided.

BUDGE, C. J.—Respondent was the owner of certain timber lands which he had purchased from the United States government with "lieu land scrip" of the Santa Fe Pacific Railway Company. Patent was issued to the latter company, from which respondent received a power of attorney authorizing him to deed the land.

On September 27, 1911, respondent sold the land to the appellant, Milwaukee Lumber Company, giving the latter a quitclaim deed thereto, and at the same time appellant company entered into an agreement with respondent to pay him \$12,000 as the purchase price, payable as follows: \$1,000 on or before November 1, 1911; \$2,500 on or before January 1, 1912; and the balance on or before July 1, 1912. No part of the purchase price was ever paid, and respondent brought this action to recover the purchase price together with the accrued interest.

Appellant answered, admitting the agreement to pay the amount alleged by respondent, alleging that the legal title to the property was in the Santa Fe Pacific Railway Company; that appellant conveyed same, acting as attorney in fact for the railway company, but denying that respondent was the equitable owner of the land; admitting that no payments had been made under the agreement, but denying that any sums were due or owing thereunder; alleging that as a part of the same transaction, with the knowledge, acquiescence, understanding and at the request of respondent, appellant entered into an agreement with Lindquist & Lindquist, who were to purchase the land, appellant to purchase the timber, as soon as cut and delivered, and out of the proceeds thereof was to pay respondent the sum mentioned in the agreement sued upon; and further alleging that it merely held the title in trust for the rightful owner, to whom it was ready to convey. Who was the rightful owner was not alleged. It was further alleged, that immediately after the execution of the instrument sued upon, the McGoldrick Lumber Company had brought suit in the federal court against respondent, appellant and Lindquist & Lindquist, to quiet title to this same property, in which suit an injunction had issued preventing the parties from performing their several contracts, which suit was still pending; and asked to have Lindquist & Lindquist made parties to the action.

A jury being waived, the trial court found all of the facts in favor of respondent, which findings are clearly supported by the evidence, and judgment was entered accordingly.

Points Decided.

This appeal is from the judgment. Several errors are assigned, but we have carefully examined all of them, in connection with the entire record, and find that they are without merit.

Respondent filed a motion herein, supported by affidavits, charging that the appeal is frivolous and was taken solely for the purpose of delay, and asking that, for this reason, damages be awarded against appellant, as a penalty. In opposition thereto, appellant filed a counter-showing. We have carefully examined the showing made for and against the motion, and have reached the conclusion that, under all the circumstances of the case, the penalty should not be imposed. The motion is therefore denied.

The judgment is affirmed. Costs awarded to respondent.

Morgan and Rice, JJ., concur.

(July 2, 1917.)

ELLA G. LIBBY, Appellant, v. C. W. PELHAM,
Respondent.

[166 Pac. 575.]

CHANGES OF LANGUAGE IN REVISIONS OF STATUTES — CONSTRUCTION OF
REVISED STATUTES—PROHIBITION TO COUNTY COMMISSIONERS FROM
DEALING IN COUNTY WARRANTS—SECTIONS 258 AND 260, REVISED
CODES, CONSTRUED.

1. Sec. 5 of the Revised Statutes of 1887, and sec. 5 of the Rev. Codes of 1909, both provide that the provisions of said Revised Statutes and Revised Codes, "so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments."

2. Changes made by a revision of a statute, as distinguished from legislative amendment, will not be regarded as altering the law as it existed previous to revision, unless it is clear that such was the intention, and if the statute as revised is ambiguous or is

Argument for Appellant.

susceptible of two constructions, reference may be had to prior statutes for the purpose of ascertaining intention.

3. Sec. 258, Rev. Codes, was a part of an act entitled, "An act to prevent officers from dealing in certain securities." The use of the word "dealing" clearly indicates an intention on the part of the legislature to preclude officers from dealing in such securities in any manner whatsoever, whether for their own use or benefit or that of any other person.

4. Where a wife purchased purported county warrants, through her husband as her agent, who was at the time of such purchase a county commissioner, she must be presumed to have done so with the knowledge that under the provisions of secs. 258 and 260, Rev. Codes, the county treasurer would be without authority to pay such warrants, and she is not in a position to complain that there was no consideration.

5. Rights based on a violation of law will not be enforced, and if a transaction is illegal because in contravention to a statute, it will not be upheld in any way, but the parties will be left in the situation in which they have voluntarily placed themselves.

6. *Held*, that the trial court did not err in directing the jury to return a verdict for defendant.

[As to constitutionality of code amendment or revision, see note in 86 Am. St. 267.]

APPEAL from the District Court of the Eighth Judicial District, for Kootenai County. Hon. John M. Flynn, Judge.

Action for money had and received. Judgment for defendant. *Affirmed*.

Black & Wernette, for Appellant.

When a statute is amended, repassed or re-enacted by the legislature, and a clause or part thereof omitted, and with such omission the statute as amended, repassed or re-enacted makes sense either with or without the omitted portion, there is no presumption that the legislature did not intend the omission. (2 Lewis' Sutherland's Stat. Const., p. 801, sec. 412.)

The parts of the former act omitted in the revision cannot be supplied under the guise of construction. (*State ex rel. Everding v. Simon*, 20 Or. 367, 26 Pac. 170; *Sener v. Ephrata*, 176 Pa. St. 80, 34 Atl. 954; *Pacific University v. Johnson*, 47

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Or. 448, 84 Pac. 704; *Stitt v. Bush*, 22 Or. 239, 29 Pac. 737; *Schaedler v. Columbia Contract Co.*, 67 Or. 412, 135 Pac. 536.)

"If the acts alleged do not come clearly within the prohibition of the statute, its scope will not be extended to include other offenses than those that are clearly described and provided for; and if there is a fair doubt as to whether the act charged is embraced in the prohibition, that doubt is to be resolved in favor of defendant." (36 Cyc. 1186; *Distilled Spirits Case*, 11 Wall. (U. S.) 356, 20 L. ed. 169.)

"Notice to or knowledge of a mere ministerial agent, clerk or servant will not be imputed to the principal." (2 Corpus Juris, 865; *Royle Min. Co. v. Fidelity & Casualty Co.*, 161 Mo. App. 185, 142 S. W. 443; 2 Pomeroy's Eq. Jur., sec. 668; Mechem on Agency, 2d ed., sec. 1834; *Rogers v. Dutton*, 182 Mass. 187, 65 N. E. 56; *Pennoyer v. Willis*, 26 Or. 1, 46 Am. St. 594, 36 Pac. 568; *Trenton v. Pothén*, 46 Minn. 298, 24 Am. St. 225, 49 N. W. 129.)

The rule of constructive notice to a principal can have no operation whatever in a case where the agent himself has not received actual notice. (*Wheatland v. Pryor*, 133 N. Y. 97, 30 N. E. 653; *Central Trust Co. of New York v. West India Imp. Co.*, 48 App. Div. 147, 63 N. Y. Supp. 853.)

C. H. Potts, for Respondent.

A county commissioner is prohibited by express statute from purchasing county warrants, and officers charged with the disbursement of public moneys are prohibited from paying warrants purchased by a county commissioner. (Secs. 258, 260, Rev. Codes.)

If there is any doubt that the prohibition against purchasing and selling warrants contained in the present statute applies to the facts of this case, then the statute is ambiguous and uncertain, and it is the duty of the court to resort to the original statute to determine the meaning of the present law. (*Becklin v. Becklin*, 99 Minn. 307, 109 N. W. 243; *State v. Stroschein*, 99 Minn. 248, 109 N. W. 235; *Comer v. State*, 103 Ga. 69, 29 S. E. 501; *Taylor v. Inhabitants of Town of Caribou*, 102 Me. 401, 10 Ann. Cas. 1080, 67 Atl. 2; *United*

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States v. Bowen, 100 U. S. 508, 25 L. ed. 631; *United States v. Lacher*, 134 U. S. 624, 10 Sup. Ct. 625, 33 L. ed. 1080; *Thomas v. United States*, 156 Fed. 897, 84 C. C. A. 477, 17 L. R. A., N. S., 720.)

Constructive notice to the agent is sufficient to charge the principal with knowledge of the facts which the agent could have acquired by a proper inquiry. (2 Corpus Juris, 863; *Bauer v. Pierson*, 46 Cal. 293; *Babbitt v. Kelly*, 96 Mo. App. 529, 70 S. W. 384; *Furry v. Ferguson*, 105 Iowa, 231, 74 N. W. 903.)

BUDGE, C. J.—Appellant brought suit to recover from respondent the sum of \$1,400, which she alleged in her amended complaint was had and received by respondent from appellant on March 10, 1914, as the purchase price of seven purported Kootenai county warrants, sold by respondent to appellant, and which were afterward held to be invalid on the ground that the purchase of certain timber estimates, for which said warrants were issued, was the incurring of an indebtedness on the part of the county, exceeding the income and revenue for said year.

The answer of respondent traversed the allegations of the complaint, and set up as an affirmative defense, that the warrants were not purchased by appellant but were purchased by I. A. Libby, her husband, then a member of the board of county commissioners of Kootenai county, and that the warrants were therefore invalid under the provisions of sec. 258, Rev. Codes.

The record discloses that appellant is the wife of I. A. Libby; that the board of county commissioners, of which I. A. Libby was a member, entered into an agreement with respondent, by the terms of which he agreed to sell to the county certain estimates of timber on lands lying therein, for assessment purposes, for the sum of \$2,500, and the county, through the board, agreed to purchase the same for the above amount; that the estimates were delivered to the county and a claim filed therefor by the respondent, which claim was allowed on March 5, 1914, and the county auditor ordered to draw war-

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rants in payment of the same; that on March 7, 1914, the warrants were drawn, among them being the warrants involved in this action; that on March 10, 1914, I. A. Libby purchased from respondent \$1,400 worth of these warrants for appellant, with her money; and at the time of drawing the warrants respondent assigned them, by writing his name across the back thereof.

At the close of all the evidence respondent moved for a nonsuit and a directed verdict, which latter motion was granted and the jury returned a verdict in favor of respondent, and judgment was entered thereon. A motion for a new trial was subsequently overruled. This appeal is from the judgment and from the order overruling the motion for a new trial.

Appellant relies upon fifteen assignments of error. It is not necessary to discuss them separately. The only material point raised in the case is as to whether or not the motion for a directed verdict was properly allowed.

This case was argued as a companion case to *Milner v. Pelham*, ante, p. 594, 166 Pac. 574, and much of the matter presented by counsel, both for appellant and respondent, proceeds upon the theory that many of the questions involved in the two cases are identical. It will be seen, however, that while much of the evidence in the two cases is similar, the material facts in this case do not appear in the Milner case, and the legal questions involved are in no way related. In the Milner case respondent's right to recover is based upon the invalidity of the warrants, while in the present case the validity or invalidity of the warrants is not material.

The correct solution of this case depends largely upon the construction to be given sections 258 and 260, Rev. Codes, which are as follows:

“Sec. 258. The State Treasurer and Auditor, the several county, city, district or precinct officers of this State, their deputies and clerks, are prohibited from purchasing or selling, or in any manner receiving to their own use or benefit, of any person or persons whatever, any State, county, or city warrants, scrip, orders, demands, claims, or other evidences of indebtedness against the State, or any county or city

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thereof, except evidences of indebtedness issued to or held by them for services rendered as such officer, deputy or clerk, and evidences of the funded indebtedness of such State, county, city, district or corporation."

"Sec. 260. Officers charged with the disbursement of public moneys must not pay any warrant or other evidence of indebtedness against the State, county, city or district, when the same has been purchased, sold, received or transferred contrary to any of the provisions of this chapter."

Appellant lays great stress upon the fact that sec. 258, Rev. Codes, as it was originally enacted in 1875, contained the words "or to the use and benefit" before the words "of any person or persons," and that in the subsequent Revised Statutes and Revised Codes the words "or to the use and benefit" do not appear, and contends that by the omission of these words the legislature intended to modify the meaning of the original act by withdrawing the inhibition against purchasing or selling or in any manner receiving such warrants to the use and benefit of other persons than the county, city or town officers.

While the language of the section as it appears in the Revised Codes is awkward, the meaning appears to be clear. The language used must be deemed to have the same meaning as it did before revision, if any meaning whatever is to be given to the words "of any person or persons, whatever." It should be noticed that the omission of the words "or to the use and benefit" occurs in a revision of the statutes and codes and not as an express amendment of the section. If the language is ambiguous, it should not be forgotten that both the Revised Statutes of 1887 and the Revised Codes of 1909 provide respectively, in section 5, that the provisions of the Revised Statutes and Codes, "so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments." In the absence of the provisions just quoted, it is a general and well-settled rule of statutory construction that "changes made by a revision of the statute will not be regarded as altering the law, unless it is clear that such was the intention, and, if the Revised

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Statute is ambiguous or is susceptible of two constructions, reference may be had to prior statutes for the purpose of ascertaining the intention." (*Becklin v. Becklin*, 99 Minn. 307, 109 N. W. 243; *State v. Stroschein*, 99 Minn. 248, 109 N. W. 235; *Comer v. State*, 103 Ga. 69, 29 S. E. 501; *Taylor v. Inhabitants of Town of Caribou*, 102 Me. 401, 10 Ann. Cas. 1080, 67 Atl. 2; *Thomas v. United States*, 156 Fed. 897, 84 C. C. A. 477, 17 L. R. A., N. S., 720; *United States v. Bowen*, 100 U. S. 508, 25 L. ed. 631; *United States v. Lacher*, 134 U. S. 624, 10 Sup. Ct. 629, 33 L. ed. 1080; *The Conqueror*, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. ed. 937; *Barrett v. United States*, 169 U. S. 218, 18 Sup. Ct. 327, 42 L. ed. 723.)

Applying this rule to sec. 258, Rev. Codes, and the act of which it was a part, it appears that that act was entitled, "An act to prevent officers dealing in certain securities." It cannot be argued successfully that the act merely intended to prevent officers from buying or selling such securities for their own use or benefit. The use of the word "dealing" negatives any such intention, and clearly indicates an intention on the part of the legislature to prevent officers from dealing in such securities in any manner whatsoever, whether for their own use or benefit or for the use or benefit of another person.

As will be seen from the reading of sec. 260, Rev. Codes, above quoted, the treasurer is absolutely prohibited from paying any warrant whenever such warrant has been purchased, sold, received or transferred contrary to any of the provisions of the chapter of which sec. 258, Rev. Codes, is a part. And it is also provided by sec. 6384, Rev. Codes, that:

"Every officer or person prohibited by the laws of this State from becoming a purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, who violates any of the provisions of such laws, is punishable by a fine of not more than one thousand dollars, or by imprisonment in the State Prison not more than five years."

The appellant, however innocent and ignorant of these provisions she may have been in fact, is in law presumed to know of the punishment and limitations which have been prescribed by these sections, and when she purchased the warrants in

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question, through her husband, who was at that time one of the county commissioners of Kootenai county, she did so knowing that under the statutes he was expressly prohibited from purchasing them, and that the county treasurer would henceforth be without authority to pay the warrants. If she chose to purchase the warrants under these conditions she did so at her own risk. She received precisely what she purchased, namely, purported warrants of Kootenai county, which her agent, being a county commissioner, could not legally purchase, either for himself or for anyone else, or in any capacity. The appellant also had full knowledge that the act of purchasing these warrants invalidated them and raised an absolute bar against their payment by Kootenai county, and, therefore, she is not in a position to complain that she received no consideration. (*Otis v. Cullum*, 92 U. S. 447, 23 L. ed. 496; *Sutro v. Rhodes*, 92 Cal. 117, 28 Pac. 98; *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. 31, 57 Pac. 777, 45 L. R. A. 420; *Swanger v. Mayberry*, 59 Cal. 91; *Harrison County v. Ogden*, 133 Iowa, 677, 108 N. W. 451.) In the latter case it was said:

“It is a fundamental rule, however, that rights based on the violation of the law will never be enforced by the courts. . . . If the court is advised that the transaction is illegal because in contravention of a statute making it a criminal offense, it is sufficient to justify a refusal to uphold the transaction in any way.”

It follows from what has been said that the trial court did not err in granting the motion for a directed verdict, and in instructing the jury to return a verdict for respondent. The judgment is affirmed. Costs awarded to respondent.

Rice, J., concurs.

MORGAN, J., Concurring.—Had the purported warrants in question been, at the date of their issuance, valid obligations of Kootenai county which subsequently became invalid because they were purchased by a member of the board of county commissioners, acting either in his own behalf or as

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agent for another, I would be in entire accord with the foregoing opinion, but they were not. In *Milner v. Pelham*, ante, p. 594, 166 Pac. 574, we held certain purported warrants, being a part of the same issue and issued for the same purpose as those here under consideration, to be "pieces of worthless paper, on their faces similar in all respects to valid Kootenai county warrants."

The purpose of sec. 258, Rev. Codes, quoted in the foregoing opinion, is to prohibit certain officials from dealing in public obligations evidenced by valid warrants or other evidences of indebtedness therein mentioned, and the purpose of sec. 260 is to prevent officers charged with the disbursement of public moneys from paying any warrant or other evidence of public indebtedness, otherwise valid, when the same has been purchased, sold, received or transferred contrary to any of the provisions of the chapter of which that section and sec. 258 are parts.

As I understand the facts in this case, these warrants were originally held to be invalid because of violation of sec. 3, art. 8 of the constitution, which provides, among other things: "No county . . . shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, Any indebtedness or liability incurred contrary to this provision shall be void." Therefore, these purported warrants never were valid, and the sections of the code, above mentioned and relied upon in the foregoing opinion, have no application here. In other words, nothing in these sections contained, or anywhere else in the law, so far as I have been able to find, prohibits a member of the board of county commissioners, acting either in his individual capacity or as agent for another, from purchasing "pieces of worthless paper, on their faces similar in all respects to valid Kootenai county warrants," so long as they do not constitute evidences of public indebtedness.

I. A. Libby, husband of appellant, who acted as agent for his wife in negotiating the purchase of the purported warrants, was a member of the board of county commissioners of

Points Decided.

Kootenai county, and, as such, had full knowledge of all the facts pertaining to their issuance which rendered them invalid. This knowledge upon the part of her agent was notice to appellant (*Childers v. Billiter*, 144 Ky. 53, 137 S. W. 795; *Shepard v. Wood*, 78 Ill. App. 428), and precludes her recovery. (35 Cyc. 396; *Dreisbach v. Eckelkamp*, 82 N. J. L. 726, 83 Atl. 175.) I therefore concur in the affirmance of the judgment.

The fact that appellant in this case purchased with notice of the invalidity of the warrants distinguishes it from *Müner v. Pelham*, *supra*.

(July 6, 1917.)

LOUIS CNKOVCH, Respondent, v. SUCCESS MINING COMPANY, a Corporation, Appellant.

[186 Pac. 567.]

MASTER AND SERVANT—INJURIES TO SERVANT—SAFE PLACE TO WORK—INSTRUCTIONS—TRIAL—EXPERIENCE AND KNOWLEDGE OF JUROR—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—MORTALITY TABLES—EXCESSIVE DAMAGES.

1. Instructions permitting the jury to use their own experience and knowledge examined, and *held* not to violate the rule that juries cannot take into consideration facts not shown in evidence.

2. Mortality tables are merely an aid to the jury in determining life expectancy and are not conclusive.

On right of jurors to act on their own knowledge of the facts in or relevant to the issue, see notes in 31 L. R. A. 489; 37 L. R. A., N. S., 790.

On conclusiveness and effect of tables of expectancy of life, as evidence, see note in 40 L. R. A. 560.

On servant's assumption of risk from latent dangers or defects, see note in 17 L. R. A., N. S., 76.

On excessiveness of verdicts in actions for personal injuries other than death, see comprehensive note in L. R. A. 1915F, 30; specifically as to hernia caused by injury, see page 279 of said note, and as to the injury to the sacro-iliac joint, see page 416 of said note.

Points Decided.

3. Where the jury is fully instructed on the question of assumption of risk, the fact that other instructions advise the jury that contributory negligence will be a bar to recovery but fail to state that assumption of risk will also be a bar, is not prejudicial.

4. The jury was instructed that "an employee has a right to assume, in the absence of apparent defects, that a place in which he is ordered to work by a shift boss is safe, and he is not bound to inspect it for the purpose of discovering a latent defect. And where an employee is directed to work in a certain place, he has the right, in the absence of proof to the contrary, to assume that the place has been made reasonably safe by his employer." *Held*, that this instruction does not mean that proof would have to be made by the employer that the employee's place of work was safe, irrespective of the employee's knowledge of the dangers or defects thereof, but that it merely states the general rule that the employee has a right to act on the presumption that the employer has made his place of work reasonably safe.

5. Where, in an action by a miner injured by falling rock, plaintiff did not plead any assurance of safety by his employer, but defendant pleaded that plaintiff was thoroughly familiar with his place of work and with every danger, risk and hazard there present, it was not error to permit plaintiff to testify that defendant's shift boss told him that the ground above him was all right.

6. Where a miner, working under the directions of a shift boss, is charged with the duty of picking down and removing all dangerous ground around his place of work and he has no means or opportunity to examine any other portion of the stope in which he is working beyond or above his immediate vicinity, he has a right to assume that his employer has inspected or examined that portion of the place not obvious or known to the servant and found it in a reasonably safe condition.

7. Where, in an action by a servant for personal injuries, the evidence was conflicting as to whether the rock which struck plaintiff came from the block of ore where plaintiff was working, in which case defendant would not be liable, or came from another portion of the stope, and the jury found for the plaintiff, the verdict will not be disturbed.

8. Plaintiff, an experienced miner, thirty-one years old, earning three and a half dollars a day, suffered injuries consisting of a hernia of the direct variety, injury to the pubic region and injury to the sacro-iliac joint. The sacro-iliac injury was severe and of a permanent nature, preventing any labor requiring exercise. *Held*, that a verdict for \$7,500 was not excessive.

[As to duties of mine owners to prevent injuries to employees, see note in 87 Am. St. 557.]

Argument for Appellant.

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. William W. Woods, Judge.

Action for damages for personal injury. Judgment for plaintiff. *Affirmed.*

J. E. Gyde, for Appellant.

"An instruction which leaves the jury free to consider facts not proved by the evidence, but of which they have been informed in some other way, or which tells the jury that to determine a fact they must look to the evidence as far as it is clear and unambiguous, is erroneous." (38 Cyc. 1683, 1684; 1 Blashfield's Instructions to Jurors, sec. 79; *Holt v. Spokane etc. Ry. Co.*, 3 Ida. 703, 35 Pac. 39; *Whitney v. Woodmansee*, 15 Ida. 735, 99 Pac. 968; *Burrows v. Delta T. Co.*, 106 Mich. 582, 64 N. W. 501, 29 L. R. A. 468; *Close v. Samm*, 27 Iowa, 503; *Douglass v. Trask*, 77 Me. 35.)

The result of the giving of respondent's requested instruction No. 7 was to absolutely remove from the consideration of the jury the defense of assumption of risk. (*Miller v. White Bronze Monument Co.*, 141 Iowa, 701, 18 Ann. Cas. 957, 118 N. W. 518; *Chicago etc. R. Co. v. Heerey*, 203 Ill. 492, 68 N. E. 74; *Johnson v. Mammoth Vein Coal Co.*, 88 Ark. 243, 114 S. W. 722, 123 S. W. 1180, 19 L. R. A., N. S., 646; *Schlemmer v. Buffalo R. & P. R. Co.*, 220 U. S. 590, 596, 31 Sup. Ct. 561, 55 L. ed. 596; *Tuttle v. M. Ry.*, 122 U. S. 189.)

An instruction which concludes with a direction to find in a certain way must include every element necessary to such finding, and cannot be cured by any other instruction. (1 Blashfield's Instructions to Juries, secs. 78, 80, pp. 170, 176, 177; *Just v. Idaho Canal etc. Co., Ltd.*, 16 Ida. 639, 133 Am. St. 140, 102 Pac. 381; *Portneuf-Marsh etc. Co. v. Portneuf Irr. Co.*, 19 Ida. 483, 114 Pac. 19; *Giffen v. City of Lewiston*, 6 Ida. 231, 55 Pac. 545; *Holt v. Spokane etc. Ry. Co.*, 3 Ida. 703, 35 Pac. 39; *State v. Webb*, 6 Ida. 428, 55 Pac. 892.)

The court seriously erred in its refusal to tell the jury that no assurance of safety was in issue or complained of by plaintiff in his complaint and that no liability could be predicated

Argument for Respondent.

thereon. (*Thurman v. Pittsburg & M. Copper Co.*, 41 Mont. 141, 108 Pac. 588, 590; *Minty v. Union Pac. Ry. Co.*, 2 Ida. (471) 437, 21 Pac. 660; *Telle v. Leavenworth R. T. Ry. Co.*, 50 Kan. 455, 31 Pac. 1076; *Cincinnati, I., St. L. & C. Ry. Co. v. McLain*, 148 Ind. 188, 44 N. E. 306; *Antler v. Cox*, 27 Ida. 517, 149 Pac. 731; *Woodward v. Oregon Ry. & Nav. Co.*, 18 Or. 289, 22 Pac. 1076.)

John P. Gray and Walter H. Hanson, for Respondent.

The jury may use their experience in life and knowledge as to the matters referred, first, in determining whether or not the defendant acted as a reasonably prudent person would, and, second, in estimating the loss of earning capacity and fixing his damages. (*Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. ed. 485; *Baillie v. City of Wallace*, 24 Ida. 706, 135 Pac. 850; *Maloney v. Winston Bros. Co.*, 18 Ida. 740, 111 Pac. 1080, 47 L. R. A., N. S., 634; *Walsh v. Winston Bros. Co.*, 18 Ida. 768, 111 Pac. 1090; *Barter v. Stewart Min. Co.*, 24 Ida. 540, 135 Pac. 68; *Chiara v. Stewart Min. Co.*, 24 Ida. 473, 135 Pac. 245; *Denbeigh v. Oregon-Washington etc. R. Co.*, 23 Ida. 663, 132 Pac. 112.)

No court has ever held that it is error for the court to instruct the jury to make use of their experience and general knowledge in their deliberations. (1 Brickwood's Sackett on Instructions, sec. 937; *Reed v. Territory*, 1 Okl. Cr. 481, 129 Am. St. 861, 98 Pac. 583; *Willis v. Lance*, 28 Or. 371, 43 Pac. 384, 487; *Johnson v. Hillstrom*, 37 Minn. 122, 33 N. W. 547; *Sanford v. Gates*, 38 Kan. 405, 16 Pac. 807; *Jenney Electric Co. v. Branham*, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395; *Neanow v. Uttech*, 46 Wis. 581, 1 N. W. 221.)

The instructions must all be taken and considered together, and if they, as a whole, state the law applicable to the facts in the case, that is sufficient, and the case should not be reversed. (*Barrow v. B. R. Lewis Lbr. Co.*, 14 Ida. 698, 711, 95 Pac. 682.)

The negligence charged was in not keeping the place reasonably safe and in not having the loose rock so removed that it

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would not fall on him. (*Lone Star Lignite Min. Co. v. Cad-dell* (Tex. Civ.), 134 S. W. 841.)

“The danger from which he was injured was not one of the ordinary risks of his employment.” (*Bunker Hill & Sullivan Min. & C. Co. v. Jones*, 130 Fed. 813, 65 C. C. A. 363; *Maloney v. Winston Bros. Co.*, 18 Ida. 740, 111 Pac. 1080, 47 L. R. A., N. S., 634.)

It is the absolute duty of the master to provide a reasonably safe place in which the servant shall work, having regard to the kind of work, and the conditions under which it must necessarily be performed. (*Bunker Hill & Sullivan Min. & C. Co. v. Jones*, *supra*.)

FLYNN, District Judge.—Respondent obtained judgment against appellant for personal injuries, from which judgment and from an order overruling a motion for a new trial this appeal is taken.

While operating a machine drill in appellant's mine, respondent was struck by falling rock, which, he claimed, came from straight above him and which appellant contended must have come from the block of ore on which he was working. The complaint alleges that respondent was working under the supervision and direction of a shift boss; that it was his duty to perform such work at such place and in such manner as the shift boss directed, and that it was one of the duties of the shift boss to cause such work to be done and timbering to be put in as was necessary to keep and maintain the place where the employees of the appellant were required to work reasonably safe. It is alleged that the stope where respondent was working was a large stope extending upward, and there were no lights therein except respondent's miner's lamp, and no other man was working there to his knowledge; that respondent was unable to tell how far the stope extended upward, and that while he was working therein and deeply engrossed in his work, without any notice or warning, rocks came down from above and struck and injured him. He alleges that he had no notice or knowledge that any rocks could be loosened or dropped down upon him and no warn-

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ing that any rocks were to be or would be dropped; that he had no opportunity to investigate or examine the roof or sides above where he was working, and that there were no means by which he could have reached the same; that it was no part of his duty to make inspection thereof. Negligence is predicated on appellant's failure to keep and maintain respondent's place of work in a reasonably safe condition, and in failing to cause any loose rock in said workings to be removed, and in failing to prevent other employees from working where any rock might be loosened and fall upon respondent, and in negligently directing him to work in said place without having taken the above-named precautions.

Appellant denied that it was negligent, alleged respondent's familiarity with the stope in which he was working, and also pleaded contributory negligence, assumption of risk and negligence of a fellow-servant as affirmative defenses.

The evidence was uncontradicted that it was respondent's duty to pick down and remove all dangerous ground around the place where he was working, which was on a bench on the footwall in an old stope. There was evidence tending to show that the rocks, which struck the respondent, could not have come down from any place except the footwall, because the place directly above respondent, on the six hundred foot level, was timbered and the hanging-wall did not incline sufficiently to be above his place of work.

The instructions emphasized the fact that if the rock falling upon the respondent came from the bench or face of ore in the footwall where he was working, or from a place which was within his reach and which by the exercise of reasonable care he could have observed or made safe and not from a point above him and from a place other than the block of ore on which he was drilling, the jury should find for the appellant.

We shall discuss the errors assigned in the order followed in the briefs.

The trial court instructed the jury as follows:

"You fix the standard for reasonable, prudent and cautious men under the circumstances of the case as you find them according to your judgment and experience of *what that class*

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of men do under these circumstances, and then test the conduct involved and try it *by that standard*, and neither the judge, who tries the case, nor any other person, can supply you with the criterion of judgment by any opinion he may have on that subject."

The italicized portion of the above instruction is complained of because it is said to authorize the jury to use their own experience as to the requisite standard of care irrespective of the evidence in the case. An identical instruction was discussed and approved by the supreme court of the United States in *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. ed. 485, and we are content to approve the instruction on that authority.

Instruction No. 16 is as follows:

"If you should find for the plaintiff then, in estimating his damages, you may take into consideration the extent and character of his injuries as shown by the evidence; the pain and suffering which plaintiff has endured by reason thereof; the loss of earnings caused thereby. And if you further believe from the evidence that plaintiff will continue to suffer from these injuries, then you may consider such future pain and suffering and any future loss of earning capacity, if any, as you find will naturally and probably result from such injuries, and award the plaintiff such compensatory damages as under all the circumstances of the case you may deem just. In estimating the loss of earning capacity, if you should determine from the evidence that plaintiff would be permanently injured, you may consider the expectancy of plaintiff's life, based upon the evidence *and upon your own experience and knowledge* as to such matters."

Again, in Instruction No. 17, the jury are told that they are the judges of the credibility of the witnesses and the weight to be given their testimony, and that "you have experienced and observed the affairs of life and it is your duty, if you shall determine the plaintiff is entitled to damages, under the instructions of the court in estimating the same, *to use your own experience and knowledge* as to such matters."

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It is contended that by these two instructions, as well as by the one first above referred to, the jury are authorized to determine the issues by their personal judgment, knowledge of life or experience in addition to or in disregard of the evidence; that thereby they are permitted to consider and rely on facts not proved by the evidence, which may be within their knowledge or experience. The case of *Holt v. Spokane etc. Ry.*, 3 Ida. 703, 35 Pac. 39, is cited, among others, in support of this contention.

The jury must act on the evidence regularly produced in the course of the trial proceedings and cannot act on their personal knowledge of any of the issues in arriving at a verdict. If the instructions quoted infringe upon this rule, they are erroneous. Juries may bring into their deliberations their general knowledge and experience of the ordinary affairs of life, and that they usually do so irrespective of or despite any instructions given to them is a matter of common knowledge. It seems to us that the criterion by which these alleged erroneous instructions are to be tested is whether the jury reasonably could have inferred therefrom that they could or were to use their experience and knowledge in addition to or in disregard of the evidence. We believe that the construction attempted to be placed on these instructions is somewhat strained, and the objections thereto hypercritical, and we therefore hold that the instructions do not violate the rule that the jury are not to take into consideration facts not shown in evidence.

As examples of the extent and limitations of the rule allowing the jury to use their own knowledge, observation and experience, we cite the following: *Brickwood's Sackett on Instructions*, sec. 937; *Sanford v. Gates*, 38 Kan. 405, 16 Pac. 807; *Springfield Consolidated R. Co. v. Hoeffner*, 175 Ill. 634, 51 N. E. 884; *North Chicago Street R. Co. v. Fitzgibbons*, 180 Ill. 466, 54 N. E. 483; *Willis v. Lance*, 28 Or. 371, 43 Pac. 384, 487; *Johnson v. Hillstrom*, 37 Minn. 122, 33 N. W. 547; *Jacksonville etc. Ry. Co. v. Hooper*, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. ed. 515; *Dunlop v. United States*, 165 U. S. 486, 17 Sup. Ct. 375, 41 L. ed. 799.

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During the course of the trial, respondent offered in evidence the life expectancy of one of his age according to the American mortality tables. It is contended that by the foregoing two instructions, the jury were not permitted to base their verdict as to the amount of damages on respondent's life expectancy, as shown by the evidence, but were required to call to their assistance their own experience and knowledge as to such matters, and that from their own experience and knowledge the jury may have concluded that the life expectancy of respondent was far in excess of that shown by the mortality tables.

Mortality tables are framed upon the basis of the average duration of the lives of a great number of persons. They are competent for the purpose of showing the probable length of life of a given person and are merely an aid to the jury but not conclusive. (*Morrison v. McAtee*, 23 Or. 530, 32 Pac. 400; *Vicksburg etc. R. Co. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. ed. 257; *Steinbrunner v. Pittsburg & Western Ry. Co.*, 146 Pa. St. 504, 28 Am. St. 806, 23 Atl. 239; *Denman v. Johnston*, 85 Mich. 387, 48 N. W. 565; *City of Friend v. Ingersoll*, 39 Neb. 717, 58 N. W. 281.)

We think that the instruction in question, wherein the jury were told that in estimating the loss of respondent's earning capacity they might consider his life expectancy, "based on the evidence," is not rendered erroneous by the addition of the words "and upon your own experience and knowledge as to such matters."

The third assignment of error relates to the following instruction:

"The dangers and defects must be so obvious and apparent that a reasonably prudent man would have avoided them, in order to charge the workman with contributory negligence or the assumption of the risk. This instruction is to be taken in connection with all the other instructions and the evidence in the case."

This instruction is said not even to correctly state the law as to contributory negligence, but inasmuch as the law of contributory negligence was elsewhere in the instructions

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fully and fairly defined, and inasmuch as appellant concentrates its attack on this instruction as to its unsoundness on the question of assumption of risk, we likewise shall limit ourselves to that phase of the argument. In this connection may also be considered the objection to Instruction No. 10, which is as follows:

“If you find that there was negligence on the part of the master in failing to provide a safe place for the plaintiff to work, or by failing to properly protect the plaintiff from ground which was loose and liable to fall, which by a reasonable inspection defendant could have known was loose and liable to fall or cave, and that plaintiff’s injury was caused by that neglect in the manner alleged in his complaint and not contributed to by any actions on the plaintiff’s part, then you should find for the plaintiff.”

It is urged that in each of these instructions the trial court failed to distinguish between contributory negligence and assumption of risk, and that in each instruction the defense of assumption of risk was removed from the consideration of the jury.

In the note to the case of *Low v. Clear Creek Coal Co.*, found in 23 Am. & Eng. Ann. Cas., on p. 587, are gathered cases relating to contributory negligence of miners injured by falling rocks; and in connection with the first of the foregoing two instructions, it may not be amiss to call attention to the closing words of the quotation from the case of *Union Pac. R. R. Co. v. Jarvi*, 53 Fed. 65, 3 C. C. A. 433, to wit:

“Dangers, not defects merely, must have been so obvious and threatening that a reasonably prudent man would have avoided them in order to charge the servant with contributory negligence.”

Even though these two instructions might be open to the objections urged, in view of the fact that the jury were explicitly and fully advised by Instructions 9, 8-A and 3-A as to the dangers, risks and hazards assumed by plaintiff and the effect of such assumption of risk on his right to recover, we hold that there is no prejudicial error in these instructions.

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The next error assigned is directed to Instruction No. 8, which is as follows:

“An employee has a right to assume, in the absence of apparent defects, that a place in which he is ordered to work by a shift boss is safe and he is not bound to inspect it for the purpose of discovering a latent defect. And where employee is directed to work in a certain place, *he has a right in the absence of proof to the contrary*, to assume that the place had been made reasonably safe by his employer.”

Objection is made to the italicized portion thereof. We do not think that this instruction can be construed to mean that actual or constructive knowledge by the employee of dangers or defects in his place of work would be immaterial, and that it would still be necessary that proof be made by his employer that the place was safe. “Proof” may be defined as the effect or result of evidence; and, taking such definition in connection with the remaining portion of the instruction, we think that the instruction in effect merely states that the employee has a right to act on the presumption that the employer has made his place of work reasonably safe, which is the rule supported by the authorities. (*Maloney v. Winston Bros. Co.*, 18 Ida. 740, 111 Pac. 1080, 47 L. R. A., N. S., 634; *Barter v. Stewart M. Co.*, 24 Ida. 540, 135 Pac. 68; *Bunker Hill etc. M. Co. v. Jones*, 130 Fed. 813, 65 C. C. A. 363; *Texas & Pac. Ry. Co. v. Swearington*, 196 U. S. 51, 25 Sup. Ct. 164, 49 L. ed. 392.)

Error is assigned to the action of the court in overruling the objection made to the question asked the respondent, namely: “Q. Tell the jury what Barney told you to do,” and in refusing to strike a portion of his answer where he testified that Barney told him the ground was all right; and to the action of the court in refusing to give appellant’s requested instruction as follows:

“You are instructed that in his complaint the plaintiff makes no claim that the defendant was negligent in making any assurances of safety to him, and, therefore, in your deliberations in this case you should not consider any alleged state-

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ment by the shift boss, Barney, to plaintiff, to the effect that the ground or condition above plaintiff was all right."

The theory on which these rulings are claimed to be erroneous is that there was no assurance of safety pleaded, and that the testimony was therefore irrelevant and immaterial, and that any false assurance of safety made to an employee constitutes a wholly separate and distinct ground of negligence and liability.

From the record we believe it clearly appears that it was the duty of the respondent to do such work and in such manner as appellant's shift boss directed; that it was the respondent's duty to bar down and make safe the ground where he was working; that it was not part of his business or duty to inspect the part of the stope above him, which could not be seen by the aid of his miner's lamp and which could not be examined by any means provided.

The appellant pleaded assumption of risk and that respondent was familiar with every danger, risk and hazard present at his place of work, and that he was familiar with and well knew his place of work and the stope in which he was working, and that he knew and was familiar with the walls, roof and sides of the stope and with the ground at and in the vicinity of his place of work.

It was not error to permit him to negative assumption of risk and notice of dangers, and the testimony was admissible for this purpose, even though no negligence was charged on the question of assurances of safety.

Summarizing the issues in this case, it may be stated that the first issue was: What were the duties of the shift boss and the miner? We believe that the case of *Maloney v. Winston Bros. Co.*, *supra*, is so similar in principle to the case at bar on this question that it will be unnecessary to reiterate the ideas of the court on the question of the master's duty to furnish the servant with a safe place to work, or on the question of whether or not the shift boss was a fellow-servant. The evidence supports the allegations of the complaint as outlined in the opening paragraph of this opinion in respect of the duty of respondent to follow the directions of the shift

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boss and the duty of the master, represented by the shift boss, to protect him from dangers not apparent or necessarily incident to the work at which he was engaged.

The second important issue was whether the rock which struck the respondent came from the place on which he was working or from above him. The jury were clearly instructed that if they found that he was struck by a rock coming from the block of ore on which he was working, he could not recover; and the jury found these issues in favor of the respondent. The evidence was conflicting and the verdict will not be disturbed.

The remaining issue was the extent of the injuries and the amount of damages to which respondent was entitled. The verdict is claimed to be excessive. Respondent was an experienced miner, thirty-one years of age, earning at the time of his injury three dollars and a half a day, with a life expectancy of thirty-four years. There was evidence that he was suffering from a hernia of the direct variety, which is practically always caused by some blow or severe strain. The main injury claimed, however, was to the sacro-iliac joint. The sacro-iliac joint is described by one of the witnesses as "a double wedge-shaped joint; the two hip bones slip down in the wedge from side to side and they are beveled in a wedge shape, front and backward. The lower end of the spinal column or backbone is made solid by, you might say, the fusing together of the sacral vertebrae; thus the individual bones in the sacrum are united together, forming one bone. This wedge or sacrum is held in position between the two hip bones by ligaments, muscles and fibrous tissues, nothing else holds them together. If all the soft tissue is removed from around this joint, there is nothing to retain the bone in position at all, no socket or anything like that. This joint has a limited range of motion, and whenever strain is thrown upon this joint, if the ligaments which are binding these bones together are injured, it produces pain the same as a sprained wrist. There is a tearing of the fascia and ligaments surrounding it. And in this particular case that is what we have to deal with,

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that is, any injury to these ligaments and fascia surrounding the sacro-iliac joints."

There was also testimony that the pubic region in front was injured; that the sacro-iliac injury to the respondent was very severe and was of a permanent nature, and that respondent would never be able to do any labor which required any exercise whatever. The jury found on this issue in favor of the respondent, and we, being of the opinion that the amount awarded, to wit, \$7,500, is not excessive, the verdict will not be disturbed. The judgment will therefore be affirmed. Costs awarded to respondent.

Budge, C. J., and Rice, J., concur.

(July 12, 1917.)

CHARLES J. VINCENT, Jr., Administrator of the Estate of THOMAS J. BLACK, Deceased, Substituted in the Place and Stead of THOMAS J. BLACK, Appellant, v. MYRTLE BLACK, Respondent.

[166 Pac. 923.]

**ACTION FOR DIVORCE — DEFAULT — VACATION OF — VOID JUDGMENT —
VACATION OF — DEATH OF PARTY — EFFECT OF — PROPERTY RIGHTS.**

1. Trial courts have the power to vacate defaults, and an order extending the time to plead, entered after the entry of a default, operates *ipso facto* to vacate the default.

2. A default judgment entered while a cause is at issue is void, and may be set aside by the trial court.

3. A void judgment in a divorce action may be set aside, even after the death of one of the parties, when the property interests of the survivor are involved in the proceeding.

[As to vacation of divorce decree after death of party, in direct proceedings brought by surviving party, see note in *Ann. Cas.* 1913B, 369.]

On right to contest the validity of a divorce decree after the death of one or both of the parties, see notes in 57 *L. R. A.* 583; 44 *L. R. A.*, *N. S.*, 505.

Opinion of the Court—Budge, C. J.

APPEAL from the District Court of the First Judicial District, for Shoshone County. Hon. William W. Woods, Judge.

Action for divorce. Judgment for plaintiff vacated. *Affirmed.*

Gundlach & Miller, for Appellant.

"An action for divorce is a purely personal action. Nothing is sought to be affected, but the marital status of a husband and wife. . . . Service upon them (executors, and administrators, on motion and notice) of a motion to vacate the judgment is farcical." (*Dwyer v. Nolan*, 40 Wash. 459, 111 Am. St. 919, 5 Ann. Cas. 890, 82 Pac. 746, 1 L. R. A., N. S., 551; *Kirschner v. Dietrich*, 110 Cal. 502, 42 Pac. 1064; *Barney v. Barney*, 14 Iowa, 189; *Kimball v. Kimball*, 44 N. H. 122, 82 Am. Dec. 194; 23 Cyc. 681; *Downer v. Howard*, 44 Wis. 82; *Hodges v. Tucker*, 25 Ida. 563, 580, 138 Pac. 1139; *Wayne v. Alspach*, 20 Ida. 144, 116 Pac. 1033.)

James A. Wayne, for Respondent.

A default may be set aside after the death of one of the parties, where the proceeding involves the question of property rights. If the decree of divorce is void, respondent is still the widow of Thomas J. Black and entitled to all of the community property. (*Israel v. Arthur*, 6 Colo. 85; *Lawrence v. Nelson*, 113 Iowa, 277, 85 N. W. 84, 57 L. R. A. 583; 1 Cyc. 64.)

Where an application to set aside a default is granted by the trial court, it will not be reversed on appeal except where there has been an abuse of discretion. (*Harr v. Kight*, 18 Ida. 53, 108 Pac. 539; *Hamilton v. Hamilton*, 21 Ida. 672, 123 Pac. 630.)

BUDGE, C. J.—On Nov. 24, 1915, James J. Black commenced an action for divorce against respondent in the district court for Shoshone county. An order for personal service of summons without the state was procured, and summons was

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served on respondent at Spokane, Washington, Jan. 31, 1916. On March 8, 1916, respondent's attorney made a motion for attorneys' fees, suit money and temporary alimony, supported by her affidavit. The time to answer expired on March 11, 1916. On March 14, 1916, Black's attorneys filed a *præcipe* with the clerk for a default, and the clerk entered the default of respondent for failure to answer the complaint within the time provided by law. On March 15, 1916, the district judge signed a written order, giving respondent ten days from that date within which to answer the complaint. On March 22, 1916, respondent filed her answer, together with a motion to set aside the default. On March 23, 1916, the affidavit of A. H. Featherstone, one of Black's attorneys, was filed, resisting the application to set aside the default. On April 3, 1916, the trial court entered an order, denying the motion to vacate the default and ordering the answer to be stricken from the files, and on the same date the cause was tried as a default case, findings of fact and conclusions of law were entered and a decree of divorce granted. On April 17, 1916, Black died. On May 15, 1916, a motion was filed by respondent's attorneys for an order to substitute Charles J. Vincent, Jr., administrator of the estate of James J. Black, deceased, as plaintiff in the action. Nothing further seems to have been done regarding this motion. On Sept. 19, 1916, another motion was filed, asking for an order to substitute the administrator as plaintiff and for an order, vacating and setting aside the default of the defendant, which motion was supported by an affidavit of the respondent. On the latter motion a hearing was had on the 26th day of Sept., 1916, and on Oct. 7, 1916, the court entered an order, substituting the administrator as plaintiff and vacating and setting aside the findings of fact, conclusions of law, the decree and the default. From this order the administrator has prosecuted this appeal.

The record in this case, to say the least, is in a hopeless state of confusion, but we must indulge the presumption that all of the proceedings of the trial court were regular, and although the record is silent, so far as the setting aside of the clerk's default is concerned, such must have been the result

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of the court's action, when by its order of March 15, 1916, respondent was given ten days' additional time within which to answer. That the court had the power to vacate the default there can be no question, and the order extending the time to answer was a valid order and operated *ipso facto* to vacate the default. And it further appears that the respondent filed her motion to vacate and set aside the clerk's default and also filed her answer prior to the expiration of the time limited in the written order of the court. The action of the trial court on April 3, 1916, in entering the order denying a motion to vacate the default and striking the respondent's answer from the files was clearly erroneous and void, and must have been inadvertent, by reason probably of the fact that the order extending the time to answer was not filed until some time thereafter. And when on Sept. 19, 1916, the court's attention was called to the fact that the answer had been filed within the time allowed by its order and that the cause was properly at issue, at the time it made the pretended order to strike the answer from the files, it was clearly apparent that the judgment theretofore entered was void. And the court committed no error in making its order, vacating the default and setting aside its judgment and findings of fact and conclusions of law. The cause stood just as though these void orders had never been made or entered.

That the plaintiff had died in the meantime would not operate to deprive the court of its right to set aside its void judgment, for the reason that there were property rights involved. And while there are cases to the contrary, the great weight of authority supports the rule that, if the property interests of the survivor are involved in the proceeding, the decree may be assailed, if it is for any reason void or voidable. The authorities are collected in the notes to the following cases: *Lawrence v. Nelson*, 113 Iowa, 277, 85 N. W. 84, 57 L. R. A. 583; *Dwyer v. Nolan* (*Nolan v. Dwyer*), 40 Wash. 459, 111 Am. St. 919, 5 Ann. Cas. 890, 82 Pac. 746, 1 L. R. A., N. S., 551; *McElrath v. Littell*, 120 Minn. 380, 139 N. W. 708, 44 L. R. A., N. S., 505; *Leathers v. Stewart*, 108 Me. 96, Ann. Cas. 1913B, 366, 79 Atl. 16; *Wood v. Wood*, 136 Iowa, 128, 125 Am. St. 223, 113 N. W. 492, 12 L. R. A., N. S.,

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891. See, also, *Dennis v. Harris* (Iowa), 153 N. W. 343; *Beavers v. Bess*, 58 Ind. App. 287, 108 N. E. 266.

The order appealed from is affirmed. Costs awarded to respondent.

Morgan and Rice, JJ., concur.

(July 12, 1917.)

JOHN ZIMMERMAN, Respondent, v. C. W. BROWN and
W. S. WOOD, Appellants.

[166 Pac. 924.]

USURY — CONFLICT OF LAWS — CONTRACT IN VIOLATION OF STATUTES —
VALIDITY.

1. When a contract is usurious by the laws of the state wherein it was made, but not according to those of the state wherein it is to be performed, the parties will be presumed to have contracted with reference to the laws of the latter state, unless it appears that in fixing the place of payment there was bad faith or an intention to evade the usury laws of the former.

2. Where a statute prescribes a license, or certificate, as a requisite to engaging in business, and where such is required for public protection or is a police regulation and not for revenue purposes only, a contract made in violation thereof is invalid and no recovery can be based thereon.

3. The law of 1909 (Sess. Laws 1909, p. 211, as amended by Sess. Laws 1913, p. 550) regulating the use and sale of stallions, was not passed for the purpose of raising revenue, but is a police regulation designed to protect those who purchase the services of or buy stallions.

[As to what transactions are usurious, see notes in 81 Am. Dec. 736; 46 Am. St. 178.]

The question of presumption of law of other state as to usury, see note in 21 L. R. A. 471; 67 L. R. A. 60.

On conflict of laws as to usury, see notes in 62 L. R. A. 33; L. R. A. 1916D, 750.

On validity of contract in business which it is a misdemeanor to transact, see comprehensive note in 12 L. R. A., N. S., 617.

Argument for Appellants.

APPEAL from the District Court of the Second Judicial District, for Latah County. Hon. Edgar C. Steele, Judge.

Action on promissory note. Judgment for plaintiff. *Reversed.*

Roy O. Johnson and James H. Forney, for Appellants.

A contract for services rendered, or goods sold, in violation of a statute which forbids, under penalty or otherwise, the carrying on of the particular business without a license, is void. (*Harrison v. Jones*, 80 Ala. 412; *Dudley v. Collier*, 87 Ala. 431, 13 Am. St. 55, 6 So. 304; *Hill v. Mitchell*, 25 Ga. 704; *Buckley v. Humason*, 50 Minn. 195, 36 Am. St. 637, 52 N. W. 385, 16 L. R. A. 423.)

When a statute requires persons engaging in a particular business to be licensed for the protection of the public, and not for public revenue only, the imposition of a penalty amounts to a positive prohibition of contracts made contrary to the statute. (*Taliaferro v. Moffert*, 54 Ga. 150; *Randall v. Tuell*, 89 Me. 443, 36 Atl. 910, 38 L. R. A. 143.)

Where a statute imposes a penalty for a failure to comply with its provisions, it is to be construed as prohibitory, and contracts made in direct contravention of its requirements are unlawful and void. (*Miller v. Post*, 1 Allen (Mass.), 434; *Sawyer v. Smith*, 109 Mass. 220; *Prescott v. Battersby*, 119 Mass. 285; *Johnson v. Hulings*, 103 Pa. St. 498, 49 Am. Rep. 131; *Hustis v. Pickands*, 27 Ill. 270; *Tedrick v. Hiner*, 61 Ill. 189; *Gardner v. Tatum*, 81 Cal. 370, 22 Pac. 880; *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. 230.)

The validity of promissory notes is controlled by the law of the place where the notes are executed, and not where they are payable. (*Orr's Admr. v. Orr*, 157 Ky. 570, 163 S. W. 757; *Joslin v. Miller*, 14 Neb. 91, 15 N. W. 214; *Sheldon v. Haxtun*, 91 N. Y. 124; *Kilgore v. Dempsey*, 25 Ohio St. 413, 18 Am. Rep. 306.)

If a note is void for usury where made it will be void everywhere, although it may have been made payable elsewhere as a cover for the usury. (*Vermont Loan & Trust Co. v. Hoff-*

Argument for Respondent.

man, 5 Ida. 376, 95 Am. St. 186, 49 Pac. 314, 37 L. R. A. 509; *Ocobock v. Nixon*, 6 Ida. 552, 57 Pac. 309; *Cleveland v. Western Loan etc. Co.*, 7 Ida. 477, 63 Pac. 885; *State v. Eves*, 6 Ida. 144, 53 Pac. 543.)

A. H. Oversmith, for Respondent.

"When a statutory prohibition is found in a statute enacted for the purpose of raising revenue or the regulation of traffic or business, unless it is manifestly the intention of the statute to make the contract void, the court will hold the contract as valid." (*Vermont Loan & Trust Co. v. Hoffman*, 5 Ida. 376, 95 Am. St. 186, 49 Pac. 314, 37 L. R. A. 509; Sutherland on Statutory Construction, sec. 366; *Hughes v. Snell*, 28 Okl. 828, Ann. Cas. 1912D, 374, 115 Pac. 1105, 34 L. R. A., N. S., 1133; *Dinkelspeel v. O'Day*, 47 Utah, 18, 151 Pac. 344; *Lane v. Henry*, 80 Wash. 172, 141 Pac. 365; *Larned v. Andrews*, 106 Mass. 435, 437, 8 Am. Rep. 346; *Mandlebaum v. Gregovich*, 17 Nev. 87, 45 Am. Rep. 433, 28 Pac. 121; *Harris v. Runnels*, 12 How. 79, 13 L. ed. 901; *Kern v. Feller*, 70 Or. 140, 140 Pac. 735.)

"Where a note made in one jurisdiction is payable in another, it bears interest according to the lawful rate in the place where it is payable, unless a different rate is specified in the contract." (8 Cyc. 312, and cases cited under footnote 84; Randolph on Com. Paper, par. 31; 2 Parsons on Bills and Notes, p. 324; Daniels on Neg. Inst., par. 879; *Sykes v. Citizens' Nat. Bank*, 78 Kan. 688, 98 Pac. 206, 19 L. R. A., N. S., 665.)

The problem of determining what law shall govern in deciding whether or not the contract is usurious is largely one of ascertaining what law the parties had in mind as fixing their rights under the contract. The intent of the parties is therefore usually the cardinal factor. (39 Cyc. 891-898; *Baxter v. Beckwith*, 25 Colo. App. 322, 137 Pac. 901.)

Unless there is an intent to evade the usury laws, the law of the state where the note is payable will govern. (*Crawford v. Seattle R. & S. Ry. Co.*, 86 Wash. 628, 150 Pac. 1155, L. R. A. 1916D, 732.)

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Parties in their contracts will be presumed to have used language effectuating a lawful rather than an unlawful purpose. (*Beasley v. Aberdeen & R. R. Co.*, 145 N. C. 272, 59 S. E. 60.)

MORGAN, J.—This action was instituted by respondent upon a promissory note made, executed and delivered to him by appellants for the sum of \$425. The note provided for interest at the rate of 8% per annum, was payable at Wilbur, Washington, and further provided that “if not paid when due the interest to be added to and become a part of the principal, and the whole sum of both principal and interest to bear interest thereafter at 12% per annum.” In an affirmative answer and cross-complaint appellants alleged an agreement between themselves and respondent to purchase a stallion, and that in consideration of the sale and delivery of it they executed and delivered the note above set forth; that at the time of the sale respondent had never procured any license to sell or dispose of the animal; that he had never had it passed upon by the state veterinary surgeon and had failed to post, in a conspicuous place on the main door leading into the stable where it was kept, or offered, for sale any certificate, or license, as provided by the laws of this state, and that therefore the contract was void. They prayed for judgment in the sum of \$875, claimed by them to have been expended in the feeding and upkeep of the stallion. Respondent filed a demurrer to the affirmative answer and cross-complaint, which was sustained.

It is contended by appellants that the note is usurious. The parties stipulated that it was given at Lewiston, Idaho, and that the negotiations leading up to the sale were also made at that place; that the laws of the state of Washington permit the recovery of compound interest and that under such laws the note is not usurious.

The court made and entered findings and rendered judgment in favor of respondent, as prayed for in his complaint. This appeal is from that judgment. The order sustaining the demurrer to the answer and cross-complaint is assigned as

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error, as is also the action of the court in entering the judgment and in failing to adjudge the note to be usurious.

Sec. 1539, Rev. Codes, prohibits compound interest, and if the note in question is to be governed by the laws of Idaho, it is clearly usurious, but the statutes of the state of Washington permit the collection of such interest. The question then arises: Under the statutes of which state must we test the note?

By the great weight of authority it is held that, in a case like the present one, every presumption is against an intention to violate the law, so that where notes are executed in one state and payable in another, the parties will be presumed to have contracted with reference to the law of the place where the transaction would be valid rather than in view of the law by which it would be illegal, provided, however, that there is no evidence of bad faith or of an intention to evade the usury law of the latter state. Therefore, when a contract is usurious by the law of the state wherein it was made, but not according to that of the state wherein it is to be performed, the parties will be presumed to have contracted with reference to the law of the latter state and the contract will be upheld, subject to the conditions of good faith just set forth. (39 Cyc. 899, 900; *Green v. Northwestern Trust Co.*, 128 Minn. 30, 150 N. W. 229, L. R. A. 1916D, 739; *Campbell v. Hunt*, 60 Pa. Super. 332; *Brownell v. Freese*, 35 N. J. L. 285, 10 Am. Rep. 239; *Baxter v. Beckwith*, 25 Colo. App. 322, 137 Pac. 901; *Dickinson v. Edwards*, 77 N. Y. 573, 33 Am. Rep. 671; *Brown v. Gates*, 120 Wis. 349, 1 Ann. Cas. 85, 97 N. W. 221, 98 N. W. 205; *British & American Mtg. Co. v. Bates*, 58 S. C. 551, 36 S. E. 917; *Crawford v. Seattle R. & S. R. Co.*, 86 Wash. 628, 150 Pac. 1155, L. R. A. 1916D, 732.)

The note in question, although made and executed in Idaho, was made payable in the state of Washington, and the fact that it purported to be dated at Wilbur, Washington, shows an intention of the parties that the contract was entered into in view of the laws of that state, and, since there is neither allegation nor proof of bad faith or of an effort to evade the usury laws of this state, the note is not to be deemed usurious.

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This case is distinguishable from that of *Vermont Loan & Trust Co. v. Hoffman*, 5 Ida. 376, 95 Am. St. 186, 49 Pac. 314, 37 L. R. A. 509, cited by appellant, by the fact that it was held, in the latter case, that the provision in the note specifying the place of payment without the state of Idaho was made to evade our usury laws.

The other question presented is whether or not the contract of sale is void by reason of the failure of respondent to observe the laws relative to the sale and use of stallions.

Sess. Laws 1909, p. 211, as amended by Sess. Laws 1913, p. 550, in substance, provides, among other things, that any person owning a stallion within the state, or bringing it into the state, must, before standing it for public service or offering it for sale, have it examined by the state veterinary surgeon, whose findings must be reported to the livestock sanitary board. In the event the animal is found to not be afflicted with one or more of certain diseases named in the act, it is the duty of the board to issue a license certificate indicating what defects, if any, it possesses and whether or not it is pedigreed, or subject to registration, and authorizing that it be stood for public service or sold within the state of Idaho. The act further provides that the certificate must be recorded in the office of the county recorder of the county wherein the animal is kept for public service or offered for sale, and that while it is so kept or is for sale, the owner must keep a copy of the certificate in a conspicuous place on the door of the building where it is stabled. The penalty prescribed for the noncompliance with these provisions is a fine not exceeding \$600 or imprisonment in the county jail not to exceed one year, or both such fine and imprisonment. The statute expressly terms such an offense a felony.

A statute prohibiting the making of contracts, except in a certain manner *ipso facto* makes them void if made in any other way. (9 Cyc. 476.) Where a license is prescribed by statute not as a revenue measure, but for the protection of the public, as a requisite to a particular trade or business, such as that of the keeper of a stallion, contracts violative

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thereof because of lack of the license are void. (9 Cyc. 478; *Letinson v. Boas*, 150 Cal. 185, 11 Ann. Cas. 661, 88 Pac. 825, 12 L. R. A., N. S., 575; *Smith v. Robertson*, 106 Ky. 472, 50 S. W. 852, 45 L. R. A. 510; *Randall v. Tuell*, 89 Me. 443, 36 Atl. 910, 38 L. R. A. 143; *Buckley v. Humason*, 50 Minn. 195, 36 Am. St. 637, 52 N. W. 385, 16 L. R. A. 423.)

“The rule is that where a statute prohibits and makes it highly penal for any person to pursue a given business or calling without having previously obtained a license, such person cannot recover for his services performed while pursuing such business or calling, notwithstanding a contract providing therefor.” (25 Cyc. 633.)

There can be no doubt that the statute in question was passed, not for the mere purpose of raising revenue, although it does provide for license fees, but as a public regulation designed to protect those who purchase the services of or buy stallions. It is clearly meant to insure the buyer an animal free from the defects and diseases mentioned in the statute and one able to answer the purposes for which it was sold. Hence, it comes squarely within the rule stated in the above-cited cases.

In the case of *Vermont Loan & Trust Co. v. Hoffman*, *supra*, this court held that statutes providing that one engaged in loaning money at interest must pay a license tax before commencing business, and prescribing a penalty for failure so to do, was for revenue purposes and to regulate business, not to prohibit it altogether, and hence a contract entered into by a person failing to comply therewith was not invalid. This case is to be distinguished from that, in that the statute here in question is not for revenue purposes, but is intended to prohibit any sale of stallions afflicted with certain diseases and of others until the owner complies with its provisions. The demurrer to the answer and cross-complaint should not, therefore, have been sustained.

The question of the right of appellants to recover for the feeding and upkeep of the horse has not been briefed nor argued, and no decision thereof will be rendered at this time.

Argument for Petitioners.

The judgment is reversed and the cause remanded, with directions to overrule the demurrer and for a trial of the issues framed by the pleadings. Costs are awarded to appellants.

Budge, C. J., and Rice, J., concur.

(July 13, 1917.)

ED. GRIFFITH, Plaintiff, v. WM. OWENS, WM. HIGLEY
and J. T. METHERD, Trustees of School District No. 24,
Cassia County, Idaho, Defendants.

[166 Pac. 922.]

SCHOOL DISTRICTS—BOND ELECTIONS—CONSTITUTIONAL LAW.

1. Chap. 47, Sess. Laws, 1917, p. 106, prescribing qualifications of voters at bond elections in school districts, is unconstitutional and void because it purports to qualify to vote those who belong to classes prohibited and disqualified from voting by sec. 3, art. 6, of the constitution.

2. When possible, statutes should be construed with a view to their being held constitutional and valid, but where they are so plain they admit of no construction other than their bare reading suggests, no other interpretation is possible.

[As to when statutes will be declared void as conflicting with the constitution, see note in 48 *Am. Dec.* 269.]

PETITION for writ of prohibition. Writ granted.

Richard M. Price and William Healy, for Petitioners.

"If a statute is plain, certain and unambiguous, so that no doubt arises from its own terms as to its scope and meaning, a bare reading suffices; then interpretation is needless." (Sutherland on Statutory Construction, secs. 234, 235; *Powell v. Spackman*, 7 Ida. 692, 65 Pac. 503, 54 L. R. A. 378.)

None of the constitutional provisions can be repealed by legislative enactment. (*Knight v. Trigg*, 16 Ida. 256, 100 Pac.

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1060; *Gillesby v. Board of County Commrs.*, 17 Ida. 586, 107 Pac. 71; *Pioneer Irr. Dist. v. Walker*, 20 Ida. 605, 119 Pac. 304; *Ferbrache v. Drainage Dist. No. 5*, 23 Ida. 85, Ann. Cas. 1915C, 43, 128 Pac. 553, 44 L. R. A., N. S., 538.)

T. A. Walters, Atty. Gen., and J. P. Pope, Asst. Atty. Gen., for Defendants.

Before a legislative act will be held unconstitutional, it must appear beyond a reasonable doubt that it infringes some provision of the constitution. (*Noble v. Bragaw*, 12 Ida. 265, 85 Pac. 903; *Gillesby v. Board of Commrs.*, 17 Ida. 586, 107 Pac. 71.)

When a statute can be reasonably construed and applied in a manner to avoid conflict with the constitution, such construction will be adopted by the courts. (*Grice v. Clearwater Timber Co.*, 20 Ida. 70, 117 Pac. 12; *Continental Life Ins. etc. Co. v. Hattabaugh*, 21 Ida. 285, 121 Pac. 81.)

And it is the duty of the court to give both the statute and the constitution such construction as will give effect to both, unless the statute is so clearly repugnant to the constitution as to admit of no other reasonable construction. (*Doan v. Board of Commrs.*, 3 Ida. 38, 26 Pac. 167; *People v. George*, 3 Ida. 72, 26 Pac. 983.)

A statute will not be held unconstitutional merely because the language used may extend to persons not contemplated by the constitution. (*In re Gale*, 14 Ida. 761, 95 Pac. 679.)

MORGAN, J.—The facts involved in this action are not disputed. The defendants are trustees of school district No. 24, Cassia county. They adopted a resolution to submit to the voters of the district the question of whether or not bonds in the amount of \$3,500 should be issued. An election was held resulting in twenty votes being cast in favor of, and seven against, issuing the bonds. Subsequently the board of trustees passed a resolution declaring the result of the election and authorizing the issuance of the bonds. At the election certain persons voted who possessed the qualifications to vote prescribed by chap. 47, Sess. Laws 1917, p. 106, but who were

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not qualified under the provisions of sec. 76, chap. 159, Sess. Laws 1911, p. 515, as amended by chap. 160, Sess. Laws 1913, p. 529, in that they were not resident freeholders in the district. A number of such persons not qualified, according to the law last mentioned, sufficient to change the result of the election, were permitted to vote and voted in favor of the issuance of the bonds. The constitutionality of the 1917 act is questioned. It is as follows:

“Sec. 1. That at any and all school elections including bond elections, held after the passage and approval of this Act, the following persons, and no others, shall be entitled to vote: All persons over the age of twenty-one (21) years who have resided in the district where they offer to vote at least thirty (30) days immediately preceding the election and who are:

“(1) Freeholders, including both husband and wife when the freehold is community property; or,

“(2) Parents having children under twenty-one (21) years of age.

“Sec. 2. That all Acts and parts of Acts in conflict with this Act be, and the same hereby are, repealed to the extent of such conflict.”

Sec. 2., art. 6, of the constitution provides:

“Except as in this article otherwise provided, every male or female citizen of the United States, twenty-one years old, who has actually resided in this State or Territory for six months, and in the county, where he or she offers to vote, thirty days next preceding the day of election, if registered as provided by law, is a qualified elector; . . . ”

Sec. 3 of that article prohibits certain persons from voting, among them being those who are under guardianship, idiotic or insane, or who have been convicted of infamous crimes, named therein, unless they have been restored to the rights of citizenship, and sec. 4 is as follows:

“The legislature may prescribe qualifications, limitations and conditions for the right of suffrage, additional to those prescribed in this article, but shall never annul any of the provisions in this article contained.”

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The 1917 act differs from the law of 1911, as amended, in this important particular: It purports to permit those who are not freeholders but who have children under twenty-one years of age to vote, regardless of any constitutional requirement, except that the voter must be over the age of twenty-one years and have resided in the district where he offers to vote at least thirty days immediately preceding the election.

The 1917 act is in conflict with the constitutional provisions above quoted, in that by its terms citizenship of the United States and six months' residence in the state are not necessary qualifications, and an insane person, one convicted of treason, or any of the other crimes mentioned in the constitution, might vote. Therefore, because it purports to qualify as electors those who belong to classes prohibited and disqualified by the constitution from voting, it is void and the 1911 Session Law, as amended, *supra*, is still in full force and effect.

It is true acts of the legislature should be construed, if possible, with a view to their being held constitutional, but the 1917 act reciting, as it does, that "the following persons, and no others, shall be entitled to vote," and then proceeding to set forth the requisite qualifications, is so plain, that it admits of no construction other than its bare reading suggests, and any other interpretation is impossible. (Sutherland on Statutory Construction, sec. 234; *Weiser Nat. Bank v. Washington Co.*, *ante*, p. 332, 164 Pac. 1014.)

A sufficient number of persons having voted in favor of the issuance of the bonds who were not qualified to do so under the law, to change the result, the election is void, and the writ of prohibition will issue as prayed for in the complaint. Costs are awarded to plaintiff.

Budge, C. J., and Rice, J., concur.

Points Decided.

(September 26, 1917.)

ROBERT A. GRAHAM, Respondent, v. BROWN BROTHERS COMPANY, a Corporation, Appellant.

[168 Pac. 9.]

**CONTRACT FOR FRUIT TREES—INSTRUCTIONS—FOREIGN CORPORATION—
STATUTE OF LIMITATIONS—EVIDENCE—MEASURE OF DAMAGES—
ERRONEOUS INCLUSION OF INTEREST IN JUDGMENT.**

1. The following instruction was given in this case: "Where fruit trees are sold under a warranty, express or implied, that they are of the kind selected and they prove to be not of such kinds in part or whole, the measure of damages is the difference in value between the orchard actually grown from the trees received, at the next planting time after the discovery of the breach, and the value which such orchard would have had if the trees had been as warranted. . . . " *Held*, that under the facts, as shown by the record, the giving of such instruction, without the inclusion of the words "at the same time deducting the cost of taking care of such trees," was not erroneous.

2. An instruction to the effect that a foreign corporation, which has admittedly failed to comply with the statutes of this state in regard to designating an agent upon whom service of summons may be had, is not entitled to urge the defense of the statute of limitations is not erroneous when the statute of limitations has been pleaded as a defense.

3. Copies of contract orders for trees, which were afterward merged in a single contract between the parties, may be properly received in evidence as showing specific acts of the parties in making the contract and the steps which were taken leading up to the making of the final contract and the execution thereof.

4. An instruction which directed the jury, in the event they found for plaintiff, to assess his damages and then add interest at the rate of seven per cent per annum from the date of the discovery of the true character of the fruit trees to the date of trial, is erroneous; but, where it appears that the prevailing party has offered to remit the interest erroneously included in the judgment in accordance with such instruction, a judgment for damages will not be reversed on account of such error, when the amount by which

Argument for Appellant.

the verdict was thereby increased is easily ascertainable and the proper deduction can be made with certainty.

[As to statute of limitations, and disability to plead same on part of foreign corporation which has not appointed local agent to be served with process, see note in 104 Am. St. 749. See, also, note in Ann. Cas. 1915D, 913.]

APPEAL from the District Court of the Fourth Judicial District, for Twin Falls County. Hon. James R. Bothwell, Judge.

Action for damages for breach of contract. Judgment for plaintiff, and defendant appeals. *Affirmed and modified.*

E. A. Walters and Taylor Cummins, for Appellant.

"The measure of damage is the difference in value between the orchard actually grown from the trees received, at the next planting time after the discovery of the breach, and the value such orchard would have had if the trees had been as warranted, at the same time deducting the cost of taking care of such trees." (*Shearer v. Park Nursery Co.*, 103 Cal. 415, 42 Am. St. 125, 37 Pac. 412; *Grisinger v. Hubbard*, 21 Ida. 469, Ann. Cas. 1913E, 87, 122 Pac. 853.)

The jury were instructed to assess the damages as of the date of the discovery and to add interest thereto at the rate of seven per cent per annum from the date of such discovery to the date of trial. This instruction is obviously incorrect. (*Austin v. Brown Brothers Co.*, 30 Ida. 167, 164 Pac. 95; *Barrett v. Northern Pac. Ry. Co.*, 29 Ida. 139, 157 Pac. 1016.)

A foreign corporation taking orders within the state, as this appellant corporation was doing, need not comply with sec. 2792, Rev. Codes. (*Belle City Mfg. Co. v. Frizzell*, 11 Ida. 1, 81 Pac. 58.) It is therefore not barred from invoking the statute of limitations in an action brought against it. (*Hale v. St. Louis & S. F. R. Co.*, 29 Okl. 192, Ann. Cas. 1915D, 907, 134 Pac. 949, L. R. A. 1915C, 544.)

"A man cannot be made debtor to any indefinite number with whom he never contracted, by their making arrange-

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ments with one with whom he has contracted to deliver property on his contract." (6 R. C. L. 881; *Rossman v. Townsend*, 17 Wis. 95, 98, 84 Am. Dec. 733.)

One recovery has been had on the Austin contract and affirmed by this court, and respondent is not entitled to recover.

E. M. Wolfe, for Respondent.

The court instructed the jury that our damages were the difference in the value of the land with the trees as actually received and what its value would have been had the trees been as ordered, saying nothing about the cost of caring for the trees during the several years. That instruction is correct, because we did actually care for the trees and actually spent the money, and, of course, it should not be deducted from the value, or the difference in value, of the orchard. (*Fuhrman v. Interior Warehouse Co.*, 64 Wash. 159, 116 Pac. 666, 37 L. R. A., N. S., 89.)

BUDGE, C. J.—This is an action for damages alleged to have been sustained by respondent by reason of the failure of appellant to deliver certain apple trees of the particular varieties purchased from appellant. The order for the trees was given in June, 1905, and the trees were delivered to respondent in the spring of 1906, and planted by him on an area of land embracing eight acres. The evidence shows that this was respondent's first experience in the orchard business and that he did not know at the time the trees were delivered that they were not true to name, nor did he discover such fact until some time early in 1910. This action was brought in December, 1912. Appellant's answer put in issue the allegations of the complaint, and as an affirmative defense pleaded the statute of limitations. The case was tried to a jury and a verdict was returned in favor of respondent for \$1,087, \$287 of which sum represented interest from the time of the alleged discovery. This appeal is from the judgment which was entered on the verdict.

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This action arises out of the same contract which formed the basis of the action in *Austin v. Brown Bros. Co.*, 30 Ida. 167, 164 Pac. 95. Most of the questions which arise herein were discussed and disposed of in the Austin case, and it will be unnecessary here to restate in detail all of the matters therein considered. The contract was procured by one Stark, the agent of appellant. It appears from the record that Stark first procured separate contracts from James S. Austin, W. L. Austin, and this respondent, and at Stark's suggestion the orders were combined in one contract for convenience in shipping and to minimize transportation charges.

Numerous errors have been assigned, for the most part relating to instructions given or refused. The seventh assignment of error attacks the sufficiency of instruction No. 21, the material part of which, so far as the point raised is concerned, reads as follows: "Where fruit trees are sold under a warranty, express or implied, that they are of the kind selected and they prove to be not of such kinds in part or whole, the measure of damages is the difference in value between the orchard actually grown from the trees received, at the next planting time after the discovery of the breach, and the value which such orchard would have had if the trees had been as warranted. . . . " The contention is that this instruction is erroneous in that the words, "at the same time deducting the cost of taking care of such trees," were not included in the instruction, reliance being placed upon the approval of an instruction, with the additional words just quoted, in *Grisinger v. Hubbard*, 21 Ida. 469, Ann. Cas. 1913E, 87, 122 Pac. 853. The point here sought to be made does not appear to have been called to the attention of the court in the *Grisinger* case. Under the facts of the present case the instruction as given cannot be said to be erroneous. In the *Grisinger* case the trees died; therefore they required no care for the full period of time and there was no cost of taking care of the trees. The cost of production which has actually been incurred should not be deducted from the value of the land. (*Fuhrman v. Interior Warehouse Co.*, 64 Wash. 159, 116 Pac. 666, 37 L. R. A., N. S., 89. See, also, extended note

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to *Leonard Seed Co. v. Crary Canning Co.*, 147 Wis. 166, Ann. Cas. 1912D, 1077, 132 N. W. 902, 37 L. R. A., N. S., 79.)

The ninth assignment of error complains of instruction No. 23, to the effect that a foreign corporation, which has admittedly failed to comply with the statutes of this state in regard to designating an agent upon whom service of summons may be had, is not entitled to urge the defense of the statute of limitations. Appellant having failed to deny specifically in its answer, that it had not neglected and refused to designate such an agent, has admitted that it did not do so. A similar instruction was approved in the *Austin* case, *supra*, and although under the facts of that case "the instruction was gratuitous," its giving was not erroneous. In the present case the statute of limitations was pleaded as a defense, and hence the instruction was entirely proper.

The twelfth and thirteenth assignments of error attack the admission of certain exhibits which were copies of the various contract orders which formed the basis of the contract which gave rise to this suit. Under the rule announced in the case of *Grisinger v. Hubbard*, *supra*, "they should be received as the specific acts of the parties in making the contract, and the steps which were taken which lead up to the making of the order for the trees and the filling of such order by shipping such trees."

The instructions taken as a whole, with the exception of instruction No. 22, attacked by assignment of error No. 8, fairly and fully state the law of the case to the jury, and an examination of the instructions offered by appellant and refused by the court discloses no prejudicial error.

Instruction No. 22, which directed the jury in the event they found for plaintiff to assess his damages and then add interest at the rate of seven per cent per annum from the date of the discovery of the true character of the trees to the date of trial, is erroneous, and should not have been given. (*Austin v. Brown Bros. Co.*, *supra*; *Barrett v. Northern Pac. Ry. Co.*, 29 Ida. 139, 157 Pac. 1016.) But it appears that respondent has offered to remit the interest thus erroneously included in the judgment, and a judgment for dam-

Points Decided.

ages will not be reversed for error in an instruction as to the measure of damages if the amount which the verdict was increased by the error is easily ascertained and a *remittitur* is filed for that amount. (*Fuhrman v. Interior Warehouse Co., supra; Barrett v. Northern Pac. Ry. Co., supra.*)

Finding no error in the record, other than as above noted, the judgment is affirmed for the sum of \$800, and by reason of the fact that appellant has been forced to prosecute this appeal in order to correct the judgment, costs are awarded to appellant.

Morgan and Rice, JJ., concur.

(September 27, 1917.)

A. C. AMONSON and W. B. PYEATT, Copartners, Doing Business Under the Firm Name and Style of AMONSON & PYEATT, Respondents, v. W. F. STONE, Appellant.

[167 Pac. 1029.]

PRINCIPAL AND AGENT—PROOF OF AGENCY—NEW TRIAL—AFFIDAVITS—NEWLY DISCOVERED EVIDENCE.

1. Agency may be implied where one person holds out another as his agent and thereby invests him with apparent or ostensible authority as such; it may be implied from prior habit or course of dealing of a similar nature between the parties, or from a previous agency, as where the alleged principal has previously employed the alleged agent as such in transactions similar to the one in question.

2. To entitle one to a new trial upon the ground of newly discovered evidence, it must be shown, in the affidavits filed in support of the motion, that the newly discovered evidence could not, with reasonable diligence, have been discovered and produced at the trial.

[As to liability of principal for unauthorized acts of agent, see note in 88 Am. St. 780 et seq.]

APPEAL from the District Court of the Sixth Judicial District, for Lemhi County. Hon. James R. Bothwell, Presiding Judge.

Opinion of the Court—Morgan, J.

Action in *assumpsit*. Judgment for plaintiffs. *Affirmed*.

E. W. Whitcomb, for Appellant.

Where money or its equivalent has been paid for the use of another, the request or ratification may be either expressed or implied. (27 Cyc. 837.)

A subsequent ratification renders the defendant liable. (*Little Bros. Fertilizer etc. Co. v. Wilmott*, 44 Fla. 166, 32 So. 808; *Allen v. Bobo*, 81 Miss. 443, 33 So. 288.)

A subsequent recognition is equivalent to a previous request. (*Oliphant v. Patterson*, 56 Pa. St. 368; *Wolff v. Matthews*, 39 Mo. App. 376; *Ross v. Pearson*, 21 Ala. 473.)

A. C. Cherry, for Respondents.

Under our law the acceptance of a bill or order must be in writing and signed by the drawee. (Rev. Codes, sec. 3589; *Erickson v. Inman*, 34 Or. 44, 54 Pac. 949.)

Strong and convincing proof must be shown before credence can be given to the existence of any such alleged special contract; otherwise, the wise provisions of the statute, requiring bills and orders to be accepted in writing, would be rendered nugatory. (*Luff v. Pope*, 5 Hill (N. Y.), 413; *Baer v. English*, 84 Ga. 403, 20 Am. St. 372, 11 S. E. 453.)

There should be in this, as in other contracts, clear evidence of an intention to do a binding act. It would be attended with the most mischievous consequences, if every loose conversation should be construed into a binding contract. (*Van Buskirk v. State Bank*, 35 Colo. 142, 117 Am. St. 182, 83 Pac. 778; *First Nat. Bank v. Commercial Savings Bank*, 74 Kan. 606, 118 Am. St. 340, 11 Ann. Cas. 281, 87 Pac. 746, 8 L. R. A., N. S., 1148; *Walker v. Lide*, 1 Rich. (S. C.) 249, 44 Am. Dec. 252.)

MORGAN, J.—James P. Roddy and William Roddy contracted to deliver lumber to W. F. Stone, appellant herein, who was conducting a lumber business under the name of

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Stone Lumber Company, and on July 2, 1910, drew two orders upon him, as follows:

“Salmon, Idaho, July 2, 1910.

“Stone Lumber Co.

“Please pay to Mr. Amonson \$36.95 and charge the same to

“JAMES P. RODDY.”

“To Stone Lumber Co., Dr.

“Mr. W. H. O'Brien please pay to Lex Rossi for labor \$36.75 Thirty-six 75/100.

“WM. RODDY.

“O.K.—By WM. RODDY.”

These orders were never accepted in writing by appellant, or his agent, but were paid by respondents, who thereafter instituted this action to recover the amount so paid, with interest, alleging in their complaint that such payment was made upon the express promise of appellant through his duly authorized agent, W. H. O'Brien, to reimburse them. In his answer appellant denied the making of any such promise through O'Brien, or otherwise, and denied that the latter was his agent or had any authority to act for him in the transaction, or that he owed the parties on whose account the orders were drawn. A verdict was rendered in favor of respondents, and judgment was entered accordingly. From the judgment and from an order denying a motion for a new trial, this appeal is taken.

It is contended by appellant that in view of sec. 3589, Rev. Codes, which provides that the acceptance of bills of exchange must be in writing, no recovery can be based upon these orders because there was no written acceptance by appellant. Without discussing the question of whether or not these orders constitute bills of exchange, it is sufficient to say that sec. 3589, *supra*, is not applicable to this case for the reason that respondents have sued upon an agreement to pay the claims evidenced by the orders. The evidence was amply sufficient to warrant the jury in concluding that respondents paid out the money at the request of O'Brien for the use and benefit of appellant.

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The principal question which presents itself is whether or not O'Brien was the agent of appellant and acting within the scope of his real or apparent authority in the transaction. Appellant admitted, upon cross-examination, that O'Brien looked after business matters for him while he was away and when he could not be reached; that he, O'Brien, paid and accepted orders, and that when he accepted orders appellant paid them. He also admitted that O'Brien looked after his business, in a way, generally. O'Brien testified that appellant never refused to pay an order that he had O.K.'d; that he had authority to accept orders for labor performed. Respondent, Amonson, testified that O'Brien had come to him with the statement that he was looking after appellant's interests. Witnesses who had performed services for appellant testified that their orders, drawn by reason of such service, were paid by O'Brien.

"Agency may be implied where one person, by his conduct, holds out another as his agent, or thereby invests him with apparent or ostensible authority as agent. . . . It is usually held that an agency may be implied from prior habit or course of dealing of a similar nature between the parties, or from a previous agency, as where the alleged principal has previously employed the alleged agent as such in transactions similar to the one in question." (2 C. J. 440; *Kelly v. Ning Young Benev. Assn.*, 2 Cal. App. 460, 84 Pac. 321; *Gambrill v. Brown Hotel Co.*, 11 Colo. App. 529, 54 Pac. 1025; *Bull v. Duncan*, 9 Kan. App. 887, 59 Pac. 42; *Fitzgerald Cotton Oil Co. v. Farmers' Supply Co.*, 3 Ga. App. 212, 59 S. E. 713; *Aga v. Harbach*, 127 Iowa, 144, 109 Am. St. 377, 4 Ann. Cas. 441, 102 N. W. 833; *Hawkins v. Windhorst*, 77 Kan. 674, 127 Am. St. 445, 96 Pac. 48, 17 L. R. A., N. S., 219; *Lindquist v. Dickson*, 98 Minn. 369, 8 Ann. Cas. 1024, 107 N. W. 958, 6 L. R. A., N. S., 729; *Haluptzok v. Great Northern R. Co.*, 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 739; *Pullman Palace Car Co. v. Nelson*, 22 Tex. Civ. 223, 54 S. W. 624; *Stockton v. Watson*, 101 Fed. 490, 42 C. C. A. 211.)

The evidence is sufficient to sustain the finding of the jury that O'Brien was the agent of appellant and had authority to bind him in the transaction.

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Appellant contends that the court erred in admitting evidence concerning an oral statement made by him, after the purchase of the orders, that they would be paid. Without passing on the contention that such a promise would not be binding upon appellant, we hold that such evidence was admissible as a declaration against interest and to show that instead of repudiating O'Brien's acts, he, in a manner, acknowledged the agency.

In support of his motion for a new trial appellant filed the affidavit of W. H. O'Brien, the allegations of which were in refutation of the testimony of certain of respondents' witnesses. The only reason given for not producing such evidence at the trial was that affiant had forgotten the transaction at that time. The allegations in the affidavit are stated by affiant: "to the best of his recollection and belief." There was no showing whatever made that appellant could not have, with reasonable diligence, discovered and produced, at the trial, the evidence set forth in the affidavit. Such showing is necessary in order to bring the case within the scope of sec. 4439, subd. 4, Rev. Codes. The court did not err in refusing to grant the motion for a new trial. (*Knollin & Co. v. Jones*, 7 Ida. 466, 63 Pac. 638; *Hall v. Jensen*, 14 Ida. 165, 93 Pac. 962; *Montgomery v. Gray* (on rehearing), 26 Ida. 583, 585, 144 Pac. 646.)

The judgment is affirmed and costs are awarded to respondents.

Budge, C. J., and Rice, J., concur.

Points Decided.

(September 27, 1917.)

E. A. CRANDALL, Respondent, v. C. O. GOSS, Appellant.

[167 Pac. 1025.]

NORTHERN PACIFIC RAILROAD RIGHT OF WAY AND LAND GRANT—ADVERSE POSSESSION—PUBLIC LANDS.

1. While the right of way granted by sec. 2 of the act of Congress of July 2, 1864 (13 Stats. at L. 365), is being used by the successor to the grantee for railroad purposes title to unused portions, lying along the tracks within the boundaries of the grant, cannot be acquired, as against such successor, by adverse possession.

2. That grant was of a limited fee made on an implied condition of reverter in the event the grantee, or its successors, ceased to use or retain the land for the purpose for which it was granted.

3. Sec. 4538, Rev. Codes, provides: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." This section applies to public lands held or claimed adversely by an individual subject only to the paramount title of the United States.

4. Where a party has entered into possession of land under claim of title, founded upon a written instrument as being a conveyance of the property in question, and has held it adversely for a period of more than five years, and in all other respects conformed to the statutes of Idaho relative to acquiring title to real estate by adverse possession, and where such property constitutes a known farm or single lot, only portions of which have been inclosed or improved according to the usual course and custom of the adjoining country, the entire tract, including the uninclosed and unimproved portions, will be deemed to have been so claimed and held adversely.

[As to adverse possession of lands devoted to public use, see note in 87 Am. St. 775. As to adverse possession of the public domain, see note in 76 Am. St. 479.]

APPEAL from the District Court of the Eighth Judicial District, for Bonner County. Hon. R. N. Dunn, Judge.

Action to quiet title. Judgment for plaintiff. *Affirmed.*

Argument for Appellant.

G. H. Martin, for Appellant.

The grant of way was separate and distinct from the grant of lands in aid of building the road. Any doubt that may have existed theretofore in regard to the true construction of this grant and the title and estate conferred by it upon the railroad company was fully cleared up in the case of *Northern Pac. Ry. Co. v. Townsend*, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. ed. 1044; *Holland Co. v. Northern Pacific Ry. Co.*, 214 Fed. 920, 131 C. C. A. 216.

Under color of title less is required of the adverse claimant than under mere claim of title, as under color of title the possession and proper use, improvement and cultivation of a part will be presumed to extend to the whole tract. Under claim of title the adverse claimant must (1) protect the whole tract claimed with a substantial inclosure; or (2) must have usually cultivated or improved it. That is, the adverse title will be sustained only to the extent of the portion inclosed or cultivated or improved, and will not extend to other portions not so inclosed, improved or cultivated.

If plaintiff has color of title it must be found in his Ex. "A." That deed has not a single ambiguity in it. The land conveyed by it was not only accurately described, but the portion of land now claimed was expressly excluded from its operation.

"A deed is color of title only to that which is shown to be within the description of the grant." (*Ohio etc. Ry. Co. v. Barker*, 125 Ill. 303, 17 N. E. 797; *Weinig v. Holcomb*, 73 Iowa, 143, 34 N. W. 787; *Tate's Heirs v. Southard*, 10 N. C. 119, 14 Am. Dec. 578; *Power v. Kitching*, 10 N. D. 254, 88 Am. St. 691, 86 N. W. 737.)

Until the government declares a reverter, the title remains in the railroad company. (*Northern Pac. Ry. Co. v. Ely*, 197 U. S. 1, 25 Sup. Ct. 302, 49 L. ed. 639.)

Defendant is now claiming title under the original grantee of the government, and whatever right he may have obtained by his deeds from that company is a matter in which he, the railway company and the government are alone concerned.

Argument for Respondent.

He is the present holder of the legal title, at least to the extent of occupancy and use, and as against him no presumption will be drawn in favor of the holder of color of title only. (*White v. Harris*, 206 Ill. 584, 69 N. E. 519.)

In actions of this kind the plaintiff must recover, if at all, upon the strength of his own title. (*Delacey v. Commercial Trust Co.*, 51 Wash. 542, 130 Am. St. 1112, 99 Pac. 574.)

O. C. Granger and O. J. Bandelin, for Respondent.

The railroad company under its grant from Congress received only a limited fee in all lands given and made upon an implied condition of reverter in the event that the company cease to use or retain the land for the purpose for which it was granted. (*Holland Co. v. Northern Pac. Ry. Co.*, 214 Fed. 920, 131 C. C. A. 216; *Oregon Short Line R. Co. v. Quigley*, 10 Ida. 770, 80 Pac. 401; *Melder v. White*, 28 Land Dec. 412.)

The language used in the exception clause of the deed from the company to Crandall is merely the reservation of a right of way. (*Abercrombie v. Simmons*, 71 Kan. 538, 114 Am. St. 509, 6 Ann. Cas. 239, 81 Pac. 208, 1 L. R. A., N. S., 806; *Hill v. Western Vermont R. Co.*, 32 Vt. 68, 74.)

Upon the abandonment being shown, the title reverted to the owner of the servient estate. (*Mills v. Denver & Rio Grande R. Co.*, 198 Fed. 137.)

This action can be maintained by the plaintiff for the protection of his reversionary rights. (*Neitzel v. Spokane International E. R. Co.*, 65 Wash. 100, 117 Pac. 864, 36 L. R. A., N. S., 522, and cases cited; *Anderson v. Interstate Mfg. Co.*, 152 Iowa, 455, 132 N. W. 812, 36 L. R. A., N. S., 512.)

The respondent is entitled to have the title to the property in controversy quieted in him on the ground of adverse possession. (*Johnson v. Hurst*, 10 Ida. 308, 77 Pac. 784.)

Color of title exists whenever there is a reasonable doubt regarding the validity of the apparent title, whether such doubt arises from the circumstances under which the land is held, the identity of the land conveyed or the construction of the instrument under which the party in possession holds his

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title. (*Cameron v. United States*, 148 U. S. 301, 308, 13 Sup. Ct. 595, 37 L. ed. 459, 462; *Northern Pac. R. Co. v. Pyle*, 19 Ida. 3, 112 Pac. 678; *Cramer v. Walker*, 23 Ida. 495, 497, 130 Pac. 1002.) Title to easements, franchises, etc., may be lost by abandonment. (1 R. C. L. No. 4, 135 Am. St. 899, and note, 1 L. R. A., N. S., 806.)

Title to a right of way may be acquired by adverse possession. (1 R. C. L. 737, 2 L. R. A., N. S., 775.)

Whatever may be the respective rights of plaintiff and the Northern Pacific Railway in the property, or the respective rights of plaintiff and the United States, the decree of this court should, as between Crandall and Goss, quiet the title to and vest the possession of the premises in plaintiff. (*Northern Pac. Ry. Co. v. Kranich*, 52 Fed. 911; *Northern Pac. Ry. Co. v. Pyle*, *supra*.)

MORGAN, J.—By an act of Congress, approved July 2, 1864 (13 Stats. at L. 365), there was granted to the Northern Pacific Railroad Company a right of way for a railroad, and lands in aid of the construction thereof, from Lake Superior to Puget Sound. The portions of that act necessary to be considered in deciding this case are as follows:

“Sec. 2. . . . That the right of way through the public lands be, and the same is hereby, granted to said ‘Northern Pacific Railroad Company,’ its successors and assigns, for the construction of a railroad and telegraph as proposed; . . . Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain. . . .

“Sec. 3. . . . That there be, and hereby is, granted to the ‘Northern Pacific Railroad Company,’ its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast . . . every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said rail-

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road whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; . . . ”

The company definitely established its line and constructed its railroad across sections 6 and 7 in township 56 north of range 2, east of Boise Meridian, prior to any right thereto having been acquired which would defeat either of its grants.

In the year 1900, the Northern Pacific Railway Company, successor to the Northern Pacific Railroad Company, made, executed and delivered to respondent a warranty deed wherein it is recited that it “does grant, bargain and convey unto the said party of the second part, his heirs and assigns, the following described tracts of land, situate in the County of Kootenai (now Bonner) in the State of Idaho, that is to say: Lots One (1) and Two (2) and the West half of West half of Northeast quarter of Northwest quarter (W. $\frac{1}{2}$ of W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$) of Section No. Seven (7) in Township Fifty-six (56) North, Range Two (2) East of the Boise Principal Meridian, containing, according to the United States Government Survey, exclusive of the following described strip of land, Sixty-four and $\frac{58}{100}$ (64 and $\frac{58}{100}$) acres, more or less, except a strip of land extending through the same (or so much of such strip of land as may be within said described premises), of the width of four hundred (400) feet, lying between two lines each drawn parallel to and distant two hundred (200) feet from the center line of the main track of the Northern Pacific Railway as the same is now located, constructed and operated on, over or across said described premises, or within two hundred (200) feet of same; . . . ”

On October 16, 1903, a homestead patent was issued conveying to respondent Lot 7 of sec. 6, said township and range, together with other lands. At the time of these conveyances the main line of the railway company occupied the 400 foot strip across Lot 7, sec. 6, and Lot 1 and the west half of west half of northeast quarter of northwest quarter of sec. 7, but

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in 1904 the company changed its line through that part of the country and removed all railroad property from the land above described on to other lands. Thereafter the company made no claim to any of the land in controversy, nor did it in any way occupy any portion of it or list it with the assessor for taxation or pay taxes upon or otherwise seek to exercise dominion over it, until June 18, 1913, when it made, executed and delivered to appellant a deed wherein it is recited that in consideration of one dollar, and other valuable consideration, the company "to the extent of its legal right so to do, hereby conveys, quitclaims and grants, without covenants, unto the grantee, his heirs and assigns, the right to occupy and use a portion of the right of way of the grantees granted by the act of Congress of July 2, 1864, the premises hereby granted being described as follows:

"A strip of land Two Hundred Sixty-seven (267) feet wide, being Two Hundred (200) feet wide on the northeasterly side of and Sixty-seven (67) feet wide on the southwesterly side of the center line of the original main line of the Northern Pacific Railway as formerly constructed and operated across lot One (1) of section Seven (7), township Fifty-six (56), Range Two (2) east of the Boise Meridian, Bonner County, Idaho; also a strip of land Four Hundred (400) feet wide, being Two Hundred (200) feet wide on each side of said center line across the Northeast quarter of the Northwest quarter (NE. $\frac{1}{4}$ NW. $\frac{1}{4}$) of said section, excepting so much as lies southerly of a line drawn parallel with and distant One Hundred Fifty (150) feet northeasterly from the center line of the present main line as now constructed and operated."

On July 17, 1913, the company made, executed and delivered to appellant a deed, similar in form to the one last above mentioned, whereby it purported to convey, to the extent of its legal right so to do, the right to occupy and use the following, together with other lands: "All that portion of the original right of way of said Railway Company in Lot seven (7) section six (6) Township fifty-six (56) north, Range two (2) east, B. M., being so much of said lot seven (7) as lies

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within two hundred (200) feet of the center line of the main track of said railway as originally constructed and operated, now abandoned, across said section.”

The record discloses that in 1891 respondent established his residence, as a homestead settler, upon land embraced in sec. 7 while it was unsurveyed, and that after the survey, about 1897, discovering he had located on a railroad section, he removed to the tract embraced in sec. 6; that before filing his application for a homestead entry in sec. 6, he entered into a contract to purchase from the railway company the 64.58 acres in sec. 7, pursuant to which the deed heretofore mentioned, conveying that land to him, was made. It further appears that prior to the abandonment of the right of way for railroad purposes respondent fenced and cultivated a portion of it and occupied other portions for different purposes, but that he made no claim of title thereto until after the company had ceased to use it. Ever since the abandonment, for railroad purposes, of the land in controversy respondent has occupied and cultivated those portions of it previously occupied and cultivated by him in about the same manner and to about the same extent as he did theretofore. He claims to be the owner of it by virtue of his patent and deed and by adverse possession. Appellant claims title under his deeds from the railway company.

This action was commenced by respondent to quiet his title. A decree was rendered in his favor from which this appeal was prosecuted.

It is the contention of appellant that in the deed, conveying the tract in sec. 7, from the railway company to respondent, the strip of land 400 feet wide, at that time occupied as a right of way, was excepted; that such exception amounted to something more than a mere reservation of a right of way and that had the company held title under an unconditional grant no part of it would have passed to respondent by this deed. It is conceded, however, that the grant of right of way mentioned in sec. 2 of the act of Congress of July 2, 1864, *supra*, is separate and distinct from the grant of lands in aid of building the road, made in sec. 3 thereof, and appellant

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urges that since the purpose of the right of way grant was to withdraw from entry, or other appropriation, a strip of land across the public domain 400 feet in width for the construction of a transcontinental railroad, the grantee therein named was without power to convey it voluntarily and title to it could not be acquired by an occupant by adverse possession, and cites *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. ed. 1044, *Holland Co. v. Northern Pacific Ry. Co.*, 214 Fed. 920, 131 C. C. A. 216, and *Northern Pacific Ry. Co. v. Concannon*, 239 U. S. 382, 36 Sup. Ct. 156, 60 L. ed. 342.

It seems to be well established that the title granted by sec. 2 of the act of Congress, above referred to, does not, in cases where the right of way therein provided for is located upon odd-numbered sections, become merged in or affected by the fee-simple title granted to the company by sec. 3 thereof; also that while such right of way is being used for railroad purposes, title to unused portions lying along the tracks within the boundaries of the grant cannot be acquired, as against the company, by adverse possession. The nature and effect of the grant contained in sec. 2 is discussed by Mr. Justice White, in *Northern Pacific Ry. Co. v. Townsend*, *supra*, as follows:

“The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. This being the nature of the title to the land granted for the special purpose named, it is evident that, to give such efficiency to a statute of limitations of a state as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use, would be to allow that to be done by indirection which could not be done directly.”

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The nature and effect of this grant involves the interpretation of an act of Congress and presents a federal question of which the supreme court of the United States has ultimate jurisdiction. Therefore, its decision in the Townsend case that the grant was a limited fee, made upon an implied condition of reverter in the event the company ceased to retain the land for the purpose for which it was granted, should and does govern this and all other courts.

It is true it is also decided in the case last above mentioned, as well as in *Holland v. Northern Pacific Ry. Co.*, *supra*, that an individual may not, for private purposes, acquire title to a portion of such right of way by adverse possession under a state statute of limitations, but those cases differ from the one at bar in this important particular: In the Townsend and Holland cases the rights of way had not been abandoned, but were in use for railroad purposes, which also appears to be true in case of *Northern Pacific Ry. Co. v. Concannon*, *supra*, whereas in this case it is clear the company did, in 1904, cease to use or retain the land for the purposes for which it was granted; that it completely abandoned it and rendered it subject to the condition of reverter implied from the language and purpose of the grant.

Neither of the cases cited goes to the extent of holding that where, as in this case, the railroad company has abandoned a portion of its right of way, by removal of its tracks and all other railroad property therefrom and by ceasing to use it for the purpose for which it was granted, subsequent to its sale of the tract of land across which that right of way was situated, the reverter would be to the United States instead of to the owner of the servient fee.

Upon consideration of the object of the grant, which was to procure to be built, maintained and operated a transcontinental line of railroad, and not that there be reserved to the United States title to such isolated sections of the original right of way as might be abandoned by changes in the line of road, presumably with the consent of the United States, and which could serve no useful governmental purpose, we are strongly persuaded that it was the intention of Congress

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that upon the abandonment of such portions as might, from time to time, be found no longer useful for railroad purposes, by reason of changes in the location of the tracks, title thereto should vest in the owner of the servient fee. However that may be, the title of the government is not here called in question. Assuming that the abandoned portion of the right of way reverted to the United States and not to the owner of the land across which it was located, the question presents itself: May one in possession of land, the ownership of which is in the United States, maintain an action to quiet his claim of title and right of possession as against third persons?

The case of *Johnson v. Hurst*, 10 Ida. 308, 77 Pac. 784, was one involving title to and right of possession of unsurveyed lands lying between a stream and certain fractional lots abutting upon the meander line thereof. It was held that the patentee of the lots, who had been in possession of, and had cultivated, improved and exercised complete dominion and control over the land lying between them and the stream for a period of time exceeding that fixed by the statutes of Idaho for obtaining title to land by adverse possession, although he derived no title through his patent from the government, could maintain his action to quiet title, as against a third person not a grantee from the government, under sec. 4538, Rev. Stats. (sec. 4538, Rev. Codes), which provides: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

Following the doctrine announced in that case, we hold that this action may be maintained by respondent for the possession of the land in controversy and for the purpose of quieting his title thereto as against appellant.

The remaining question necessary to be decided is as to the extent of respondent's title and right of possession; whether it includes only such portions of land as he has inclosed and cultivated, or the entire abandoned right of way across the lands granted in his patent from the United States and his deed from the Northern Pacific Railway Company.

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Sec. 4040, Rev. Codes, provides: "When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree or judgment, or of some part of the property under such claim, for five years, the property so included is deemed to have been held adversely. . . . "

Sec. 4041 is, in part, as follows: "For the purpose of constituting an adverse possession by a person claiming a title founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in the following cases: . . . 4. Where a known farm or a single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time, as the part improved and cultivated."

Sec. 4042 provides: "Where it appears that there has been an actual continued occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment or decree, the land so actually occupied, and no other, is deemed to have been held adversely."

And it is provided in sec. 4043, that "for the purpose of constituting an adverse possession, by a person claiming title not founded upon a written instrument, judgment or decree, land is deemed to have been possessed and occupied in the following cases only:

- "1. Where it has been protected by a substantial inclosure;
- "2. Where it has been usually cultivated or improved."

And, further, that in no case shall adverse possession be considered established unless it shall be shown that the land has been occupied and claimed for a period of five years continuously, and the party or persons, their predecessors and

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grantors, have paid all the taxes, which have been levied or assessed upon such land according to law.

With respect to the payment of taxes the trial court found, as a fact, and the finding is supported by the evidence, that the lands in controversy were never legally assessed for taxation from the fall of 1904, the date of its abandonment by the company, up to and until 1915; that appellant listed said lands in his own name in 1913, and they were also assessed to him for taxation for 1914, and that for those years the taxes on the lands, if any, were paid by both the appellant and respondent.

It will be observed, from an examination of the foregoing sections of the code, that if respondent entered into possession of the abandoned right of way under claim of title, exclusive of other right, founding such claim upon a written instrument as being a conveyance of the property, he will be deemed to have entered into possession of and to have adversely held, not only the portions which he fenced and cultivated, but the entire tract, while if he did not base his claim of right to entry upon a written instrument as being a conveyance of title, his right is limited to that portion of the land protected by a substantial inclosure, or cultivated or improved.

The patent from the United States, conveying to respondent the land situated in sec. 6, makes no mention of the railroad right of way, and he claims the portion of it embraced in that section under his patent, as having reverted to him as the owner of the servient fee. While it is true the language of the deed from the Northern Pacific Railway Company, conveying to respondent the tract situated in sec. 7, expressly excepts that portion embraced within the right of way then occupied by it, he went into possession of it immediately upon its abandonment by the company, proceeding upon the theory, in so doing, that the deed operated as a conveyance of the fee to the subdivisions therein described and that the exception was but a reservation of a strip of land for right of way purposes, title to which reverted to him upon its abandonment. The record discloses that not only was this respondent's belief, but that the company, by removing its property from

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the land in question and by its failure to list it for taxation or to exercise any dominion over it for an uninterrupted period of nine years, proceeded upon the same theory.

The question of the sufficiency of written instruments to constitute color of title so that the portions of tracts claimed, but uninclosed and otherwise unimproved or cultivated, will be construed to be adversely held by virtue of the inclosure, cultivation or improvement of other portions has many times been before the courts of last resort, and a compilation of authorities upon this subject is to be found in an instructive note to the case of *Jasperson v. Scharnikow*, 150 Fed. 571, 80 C. C. A. 373, 15 L. R. A., N. S., 1178. However, these decisions are based, largely, upon statutes of the states wherein the land was situated and upon facts peculiar to the cases under consideration, so that no fixed rule sufficiently broad and, at the same time, sufficiently definite to meet the requirements of all cases has, so far as we are able to discover, been announced.

It is said in *Cameron v. United States*, 148 U. S. 301, 13 Sup. Ct. 595, 37 L. ed. 459, quoting from *Wright v. Mattison*, 59 U. S. (18 How.) 50, 56, 15 L. ed. 280: "The courts have concurred, it is believed, without an exception, in defining 'color of title' to be that which in appearance is title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the inquiry with them has been whether there was an apparent or colorable title, under which an entry or a claim has been made in good faith. . . . A claim to property, under a conveyance however inadequate to carry the true title to such property, and however incompetent might have been the power of the grantor in such conveyance to pass a title to the subject thereof, yet a claim asserted under the provisions of such a deed is strictly a claim under color of title."

The court in the *Cameron* case further said: "Color of title exists wherever there is a reasonable doubt regarding the validity of an apparent title, whether such doubt arises from

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the circumstances under which the land is held, the identity of the land conveyed, or the construction of the instrument under which the party in possession claims his title."

In the case of *City of La Crosse v. Cameron*, 80 Fed. 264, 25 C. C. A. 399, it is said: "The question is not whether the instrument in law conveys title. If that were the question, the statute of limitations would here have no function and need not be considered. These statutes of repose presuppose defects in or total want of title, and are enacted to establish the claim of one in adverse possession under defective title, or under an instrument which in law conveys no title." (See, also, *Creekmur v. Creekmur*, 75 Va. 430; *Bell v. Longworth*, 6 Ind. 273.)

Assuming, which we do not decide, that the railroad right of way across the land embraced in respondent's homestead was so reserved from settlement that his patent did not pass title thereto; that the Northern Pacific Railway Company was without authority to convey the portion of the right of way situated in sec. 7, and that the language employed in the deed conveying portions of that section to him is insufficient to constitute a conveyance of the right of way, he entered into possession of the land in controversy under claim of title founded upon the written instruments above mentioned, as being conveyances of the property in question, and, having held it adversely for a period of more than five years, and in all other respects conformed to the statutes of Idaho relative to acquiring title to real estate by adverse possession, his right is that provided for in sec. 4040, Rev. Codes, and the judgment of the trial court is affirmed. Costs are awarded to respondent.

Budge, C. J., and Rice, J., concur.

Points Decided.

(September 28, 1917.)

BOISE DEVELOPMENT COMPANY, LTD., a Corporation,
Respondent, v. BOISE CITY, a Municipal Corporation
of the State of Idaho, Appellant.

[167 Pac. 1032.]

ELECTION OF REMEDIES—RES ADJUDICATA—STATUTE OF LIMITATIONS—
ULTRA VIRES—MUNICIPALITIES—IMPLIED POWERS—ACTION ON CASE
—CONSEQUENTIAL DAMAGES—PARKS—GOVERNMENTAL FUNCTIONS—
RIPARIAN OWNERS—BREAKWATERS—OBSTRUCTION OF STREAM—
MUNICIPAL LIABILITY FOR DAMAGES.

1. In order to apply the doctrine of election of remedies, the party sought to be barred must actually have had at his command more than one remedy.

2. When a party, acting upon a mistaken theory as to his legal rights, brings his action and is defeated by reason thereof, and afterward renews the litigation, basing his claim upon a correct theory, the former judgment is no bar to the second action.

3. Subd. 2, sec. 4054, Rev. Codes, limiting the time within which an action may be brought for trespass upon real property, has no application to an action on the case for consequential damages.

4. Actions on the case are governed by the provisions of sec. 4060, Rev. Codes, that: "An action for relief not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued."

5. Where damage is not a direct but only a consequential result of an act, no cause of action arises until injury has been done or actual damage inflicted.

6. Municipalities have implied authority to take whatever lawful means are necessary to carry out their express powers, and to protect their property.

7. The defense of *ultra vires* can be interposed only where the act complained of was wholly beyond the powers of the municipality. If the wrongful act in question is one which the municipality had the right to do under some circumstances or in some manner, then it is not *ultra vires*.

8. In order for a municipality to avail itself of the defense that its tort, committed while acting within the scope of its authority, was the result of the exercise of a governmental function, it must appear that such function was the exercise of a legal duty imposed

Argument for Appellant.

by the state, which it might not omit with impunity but must perform at its peril.

9. The mere grant to a municipality of power to maintain a public park enjoins no absolute duty upon it to do so.

10. The care and maintenance of parks is primarily a private as opposed to a governmental function.

11. A municipality has a right, as a riparian owner, to construct a breakwater for the protection of its property, but if in so doing it so obstructs the stream as to divert it, and thereby damages the property of another riparian owner the municipality is liable for resulting damage.

12. The liability in such cases does not rest solely upon the narrow ground of negligence, but rather upon the broad legal principle that no one is permitted to so use his own property as to invade the like property rights or cause injury or damage to the property of another.

[As to liability of a municipal corporation when injury to another person has resulted from an act done by it in its governmental capacity, see note in 108 *Am. St.* 140.]

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Charles P. McCarthy, Judge.

Action against Boise City for the diversion of the waters of Boise River. Judgment for plaintiff. *Affirmed.*

J. P. Pope, S. L. Tipton and Charles F. Reddoch, for Appellant.

The legislature, in section 1 of the charter of Boise City, outlined the public or governmental functions of the city and placed public parks as falling within the class or function of one of the governmental agencies of the city. (*City of Kokomo v. Loy* (Ind. App.), 110 N. E. 694; *Mayor etc. of Nashville v. Burns*, 131 Tenn. 281, 174 S. W. 1111, L. R. A. 1915D, 1108; *Bisbing v. Asbury Park*, 80 N. J. L. 416, 78 Atl. 196, 33 L. R. A., N. S., 523; *Blair v. Granger*, 24 R. I. 17, 51 Atl. 1042; *Board of Park Commrs. v. Prinz*, 127 Ky. 460, 105 S. W. 948; *Ackeret v. City of Minneapolis*, 129 Minn. 190, Ann. Cas. 1916E, 897, 151 N. W. 976, L. R. A. 1915D, 1111; *Clark v. Waltham*, 128 Mass. 567; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Steele v. Boston*, 128 Mass. 583; *Rus-*

Argument for Appellant.

sell v. City of Tacoma, 8 Wash. 156, 40 Am. St. 895, 35 Pac. 605; *Harper v. City of Topeka*, 92 Kan. 11, 139 Pac. 1018, 51 L. R. A., N. S., 1032.)

The Boise river is a natural navigable watercourse, under the exclusive control of the state, and the city has no right to interfere with the flow of the same in the absence of a grant of power from the state so to do. (*Walbridge v. Robinson*, 22 Ida. 236, 125 Pac. 812, 43 L. R. A., N. S., 240; *Boise Irr. etc. Co. v. Stewart*, 10 Ida. 38, 77 Pac. 25, 321, 4 McQuillin, Municipal Corporations, sec. 1437; *Scranton City v. Scranton Steel Co.*, 154 Pa. St. 171, 26 Atl. 1; *A. L. Lakey Co. v. Kalamazoo*, 138 Mich. 644, 110 Am. St. 338, 101 N. W. 841, 67 L. R. A. 931; *Kitsap County Transp. Co. v. Seattle*, 75 Wash. 673, Ann. Cas. 1915C, 115, 135 Pac. 476.)

The charter of Boise City did not give it any power or authority to encroach upon, change, control or divert the channel of the Boise river. The acts complained of are therefore *ultra vires*, and fall within the well-known rule that the city would not be liable. (6 McQuillin, Mun. Corp., sec. 2637.)

The plea of *res adjudicata* is based upon a former action, in which respondent sought to recover upon the same matters as were submitted to the jury in this case.

If the city had answered in the former action and the cause had been tried upon its merits and verdict rendered in its favor, there would not be any question about our position, but instead of pursuing this course it demurred, and the ruling upon the demurrer was as effective as a trial upon the merits. If said former action had been tried, it would have required the same evidence to establish a liability in that case as was adduced in the present action. (*State v. Superior Court*, 62 Wash. 556, 114 Pac. 427; *McGuire v. Bryant Lumber & Shingle Mill Co.*, 53 Wash. 425, 102 Pac. 237; *Brechlin v. Night Hawk Mining Co.*, 49 Wash. 198, 26 Am. St. 863, 94 Pac. 928; *Smith v. Cowell*, 41 Colo. 178, 92 Pac. 20; *Marie M. E. Church v. Trinity M. E. Church*, 253 Ill. 21, 97 N. E. 262; *Hennessy v. Chicago B. & Q. Ry. Co.* (Wyo.), 157 Pac. 698; *Hilton v. Stewart*, 15 Ida. 150, 128 Am. St. 48, 96 Pac. 579; 23 Cyc. 1215-1221.)

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At the time of instituting the former action upon contract, wherein the same damages as are sought to be recovered in this case were litigated, there was open and available to respondent the action that it then prosecuted and the present action, and by reason of its election to proceed upon the contract it is now barred and estopped from maintaining the present action. (*Whitley v. Spokane etc. Ry. Co.*, 23 Ida. 642, 132 Pac. 121; *Sheldon v. The Uncle Sam*, 18 Cal. 526, 79 Am. Dec. 193; *Chappell v. Western Ry. of Alabama*, 8 Ga. App. 787, 70 S. E. 208; *First Nat. Bank v. Felker*, 185 Fed. 678; *Manning v. Galland-Henning Pneumatic Malting Drum Mfg. Co.*, 141 Wis. 199, 18 Ann. Cas. 976, 124 N. W. 291.)

"After plaintiff has elected to proceed upon contract, he is precluded from thereafter proceeding in tort." (*Price v. Parker*, 44 Misc. Rep. 582, 90 N. Y. Supp. 98; *Birdsell Mfg. Co. v. Oglevee*, 187 Ill. 149, 58 N. E. 231; *Roney v. H. S. Halvorsen Co.*, 29 N. D. 13, 149 N. W. 688; 15 Cyc. 262; *Weeke v. Reeve*, 65 Fla. 374, 61 So. 749; *Mintz v. Jacob*, 163 Mich. 280, 128 N. W. 211; 15 Cyc. 259.)

The original complaint in the present action was filed Jan. 18, 1915, more than three years after the wrongful acts had been committed. Respondent shifted its position in its last complaint by saying its damage first occurred in April, 1913, in order to try and avoid the statute of limitations. The Court's ruling in partially, at least, shutting out our evidence in support of this plea was error. (*Hicks v. Drew*, 117 Cal. 305, 49 Pac. 189; *Williams v. Southern Pac. R. Co.*, 150 Cal. 624, 89 Pac. 599; *Vette v. Sanitary Dist. of Chicago*, 260 Ill. 432, 103 N. E. 241; *Erwin v. Erie R. Co.*, 98 App. Div. 402, 90 N. Y. Supp. 315.)

"Whenever the nuisance is of a permanent character and its construction and continuance are necessarily an injury, the damage is original, and may be at once fully compensated. In such case the statute of limitations begins to run upon the construction of the nuisance." (*St. Louis I. M. & S. Ry. Co. v. Biggs*, 52 Ark. 240, 20 Am. St. 174, 12 S. W. 331, 6 L. R. A. 804; *Little Rock & Fort Smith Ry. Co. v.*

Argument for Respondent.

Chapman, 39 Ark. 463, 43 Am. Rep. 280; Gould on Waters, sec. 369.)

J. R. Smead and Hawley & Hawley, for Respondent.

Respondent's act in instituting the former action *ex contractu* to recover damages for an alleged breach of a purported contract, in which action this court held said purported contract to be in violation of sec. 3, art. 8, of the constitution of Idaho, and therefore void, did not constitute an election of remedies in such a sense as to bar the present action in tort. Under the facts there could not be two causes of action co-existent, and therefore respondent had no actual choice of remedies.

"The party must actually have at command two inconsistent remedies." (*Whitley v. Spokane etc. Ry. Co.*, 23 Ida. 642, 132 Pac. 121; *Elliott v. Collins*, 6 Ida. 266, 55 Pac. 301.)

"The fact that a party, through mistake, attempts to exercise a right to which he is not entitled, does not prevent his afterward exercising one which he had and still has unless barred by the previous attempt." (*William W. Bierce v. Hutchins*, 205 U. S. 340, 346, 27 Sup. Ct. 524, 51 L. ed. 828; *Barnsdall v. Waltemeyer*, 142 Fed. 415, 420, 73 C. C. A. 515; *Zimmerman v. Robinson & Co.*, 128 Iowa, 72, 74, 5 Ann. Cas. 960, 102 N. W. 814; *In re Van Norman*, 41 Minn. 494, 43 N. W. 334; *Agar v. Winslow*, 123 Cal. 587, 591, 69 Am. St. 84, 56 Pac. 422; *Rowell v. Smith*, 123 Wis. 510, 3 Ann. Cas. 773, 102 N. W. 1; *Snow v. Alley*, 156 Mass. 193, 30 N. E. 691; *McLaughlin v. Austin*, 104 Mich. 489, 62 N. W. 719.)

An estoppel by judgment arises only when the point of controversy is the same in the later as in the former case, and when such point has in such former case been determined on its merits. Where the former action was founded on an erroneous theory as to the legal effect of a given state of facts, and because of such mistaken conception of the law the action was defeated, such action is not identical with a second action founded on a correct legal theory, and the doctrine of *res adjudicata* does not apply. (Black on Judgments, secs. 707-733; *Hughes v. United States*, 71 U. S. (4 Wall.) 232, 18

Argument for Respondent.

L. ed. 303; Freeman on Judgments, 4th ed., sec. 260; 23 Cyc. 1226; *Keane v. Pittsburg etc. Min. Co.*, 17 Ida. 179, 105 Pac. 60; *Rowell v. Smith, supra*; *Russell v. Place*, 94 U. S. 606, 24 L. ed. 214.)

Estoppel applies only to those matters which were directly at issue in the former judgment. Matters which were at issue only incidentally are not adjudicated in any sense which creates an estoppel. (Black on Judgments, secs. 611, 617, 622.)

The defense of *ultra vires* can be interposed only when the act complained of was wholly beyond the powers of the municipality. If the wrongful act in question is one which the municipality had the right to do in some manner, then it is not *ultra vires*. (McQuillin, Mun. Corp., sec. 2637; *Wilson v. Boise City*, 6 Ida. 391, 55 Pac. 887.)

Riparian land taken and held for public purposes by a municipality is subject to the same rules and carries with it the same rights as though taken and held privately by an individual. (Abbott, Mun. Corp., sec. 733, p. 1762; *City of La Salle v. Matthiessen etc. Zinc Co.*, 16 Ill. App. 69; *Zinc Co. v. City of La Salle*, 117 Ill. 411, 2 N. E. 406, 8 N. E. 81; McQuillin, Mun. Corp., par. 263; *Barney v. Keokuk*, 94 U. S. 324-340, 24 L. ed. 224; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 3 Sup. Ct. 445, 4 Sup. Ct. 15, 27 L. ed. 1070.)

"Municipal corporations are liable for the improper use and management of their property, to the same extent and in the same manner as private corporations and natural persons." (*Eaton v. Weiser*, 12 Ida. 544, 118 Am. St. 225, 86 Pac. 541; 2 Dillon, Mun. Corp., par. 985.)

"Where an act done by a municipal officer or agent is lawful and authorized, but performed in an unlawful manner, the municipality is liable." (McQuillin, Mun. Corp., sec. 2638; Abbott, Mun. Corp., sec. 664; *City of Denver v. Rhodes*, 9 Colo. 554, 13 Pac. 729; *Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520; *Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517; 20 Am. & Eng. Ency. of Law, 1200; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321; *Greenwood v.*

Argument for Respondent.

Westport, 53 Fed. 824, 60 Fed. 560; *Young v. Kansas City*, 27 Mo. App. 101, pp. 115, 116.)

"Municipal corporations are liable for diverting water from a natural watercourse and causing it to flow upon private property to the injury thereof." (McQuillin, Mun. Corp., secs. 2701-2704.)

There is a common-law power to construct a breakwater for the protection of city property, and such an act is not *ultra vires*. (*Müller v. Milwaukee*, 14 Wis. 642.)

Ultra vires is not a proper defense in a tort action. (*Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. ed. 176, and cases cited.)

The statute of limitation began to run not from the time the structures were built, but from the time the injury occurred. (*Hill v. Empire State-Idaho Min. etc. Co.*, 158 Fed. 881; *Rogers v. Oregon Wash. Ry. & Nav. Co.*, 28 Ida. 609, 156 Pac. 98.)

Not being a trespass, this action cannot be called an action of trespass, but an action of trespass on the case. The statute of limitations on trespass actions does not apply; on the other hand, such cases fall under the provisions of statutes similar to sec. 4053 or 4060, Rev. Codes. (*Hicks v. Drew*, 117 Cal. 305, 49 Pac. 189; *Daneri v. Southern California Ry. Co.*, 122 Cal. 507, 55 Pac. 243; *Crim v. City & County of San Francisco*, 152 Cal. 279, 92 Pac. 640; *Denney v. City of Everett*, 46 Wash. 342, 123 Am. St. 934, 89 Pac. 934; *Suter v. Wenatchee etc. Power Co.*, 35 Wash. 1, 102 Am. St. 881, 76 Pac. 298; *Roundtree v. Brantley*, 34 Ala. 544, 73 Am. Dec. 470; *Perrine v. Bergen*, 14 N. J. L. 355, 27 Am. Dec. 63; *O'Neill v. San Pedro, L. A. & S. L. R. Co.*, 38 Utah, 475, 114 Pac. 127; 1 Corpus Juris, "Actions," par. 117, and notes, pp. 996, 997; *Cooper v. Hall*, 5 Ohio, 320, 321; 6 Cyc. 682 et seq.; *Welch v. Seattle etc. R. Co.*, 56 Wash. 97, 105 Pac. 166, 26 L. R. A., N. S., 1047.)

The maintenance and operation of parks is a municipal function, for which the city is liable if negligent. (28 Cyc. 1311; *Pennell v. City of Wilmington*, 7 Penne. (Del.) 229, 78

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Atl. 915; *Denver v. Spencer*, 34 Colo. 270, 114 Am. St. 158, 82 Pac. 590.)

“The care and maintenance of parks is a private, and not a governmental, function.” (*Gartland v. New York Zoological Society*, 135 App. Div. 163, 120 N. Y. Supp. 24; *Capp v. St. Louis*, 251 Mo. 345, Ann. Cas. 1915C, 245, 158 S. W. 616, 46 L. R. A., N. S., 731; *Weber v. Harrisburg*, 216 Pa. St. 117, 64 Atl. 905; *Barthold v. Philadelphia*, 154 Pa. St. 109, 26 Atl. 304; *Silverman v. New York*, 114 N. Y. Supp. 59; *Lowe v. Salt Lake City*, 13 Utah, 91, 57 Am. St. 708, 44 Pac. 1050; *Anadarko v. Swain*, 42 Okl. 741, 142 Pac. 1104; *Canyon City v. Cox*, 55 Colo. 264, 133 Pac. 1040; *Mayor of Detroit v. Park Commrs.*, 44 Mich. 602, 7 N. W. 180; *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. Rep. 622.)

BUDGE, C. J.—This was an action for damages, alleged to have been caused by obstructing the channel of the Boise river and thereby diverting the waters thereof on to the lands of respondent. The cause was tried by a jury, who awarded respondent \$4,000 damages, for which judgment was entered. This appeal is from the judgment. No question is raised as to the sufficiency of the evidence, it being conceded by appellant that “if the legal questions raised will not defeat the action, we believe the evidence sufficient to support the verdict.”

The allegations of the complaint, so far as material, are briefly as follows: That respondent is a corporation and appellant is a municipal corporation; that respondent is the owner of certain lands riparian to the south bank of the Boise river, directly opposite and across the river from Boise City; that appellant is the owner of riparian lands along the north bank thereof; that these lands of appellant were held exclusively for park purposes and are known as the “Julia Davis Park”; that in 1910 respondent constructed a breakwater to protect its lands from erosion by the river and also maintained, outside of the breakwater, certain riprap for the same purpose; that in 1911 appellant, by its duly authorized officers and agents, devised a plan for the main-

tenance of the park, and in June or July of that year commenced work thereon; that the plan included the construction of embankments, dams and riprapping to be placed upon and in the vicinity of appellant's lands, in order to protect the park from overflow and erosion by the river, and included the filling of certain low lands then subject to overflow; that appellant thereafter constructed embankments, dams and riprapping and filled in upon and near its lands, and is continuing said work; that the work was performed in a negligent and careless manner and the dams, embankments, riprapping and filling were so placed as to obstruct the natural channel of the river and divert a large portion of the waters from the natural channel and interfere with the natural flow of the waters in the channel; and that the waters so interfered with and diverted were caused to flow against the lands, banks, ripraps and breakwater of respondent, causing the alleged damage to respondent's property; that the first damage therefrom occurred in April, 1912.

Appellant interposed a general demurrer which was overruled, and thereafter filed its answer, denying all of the material allegations of the complaint and pleading as affirmative defenses: *res adjudicata*, election of remedies and the statute of limitations.

Error is assigned to the action of the court in overruling the demurrer and in denying and overruling the several affirmative pleas. The pleas of election of remedies and *res adjudicata* set up an adjudication in a former action between the same parties. It appears that when the city began the construction of its breakwater and embankments, the development company commenced an injunction suit, in order to prevent the damage which it believed would result to its property. In order to secure a dismissal of the injunction suit the city entered into a written contract, by the terms of which it was to adequately protect respondent's lands. The city failing to comply with the terms of its contract an action was instituted for damages for its breach, culminating in the decision of this court to the effect that the contract was void because in violation of sec. 3, art. 8, of the constitution

of Idaho. (*Boise Development Co. v. Boise City*, 26 Ida. 347, 143 Pac. 531.)

It is contended by appellant that the action of respondent in bringing the former suit on breach of the contract amounted to an election of remedies, and that having elected to sue upon that contract it cannot now sue in tort. But it is essential, in order to apply the doctrine of election of remedies, that the party must actually have had at his command more than one remedy. As was said by this court in an early case, "He must not only think he has them, but must in fact have them." (*Elliott v. Collins*, 6 Ida. 266, 55 Pac. 301.) The rule there announced was followed by this court in *Whitley v. Spokane etc. Ry. Co.*, 23 Ida. 642-655, 132 Pac. 121. The latter case was cited with approval in *Nave v. Powell* (Ind. App.), 110 N. E. 1016-1020. Applying the rule to the facts in this case it is apparent that the plea of election of remedies must fail. Respondent sued for the breach of what it believed to be a contract, when as a matter of fact no such contract was in existence.

The defense of *res adjudicata* is equally untenable. The former case, *Boise Development Co. v. Boise City*, *supra*, adjudicated the sole question that respondent's pretended contract with the city was void. None of the matters at issue in this cause were affected by the judgment in the former. When a party, acting upon a mistaken theory as to his legal rights, brings his action and is defeated by reason thereof and afterward renews the litigation, basing his claim upon a correct theory, the former judgment is no bar to the second action. (Black on Judgments, sec. 733; *Hughes v. United States*, 71 U. S. (4 Wall.) 232, 18 L. ed. 303; Freeman on Judgments, 4th ed., sec. 260; 23 Cyc. 1226; *Keane v. Pittsburg etc. Min. Co.*, 17 Ida. 179-191, 105 Pac. 60; *Rowell v. Smith*, 123 Wis. 510, 3 Ann. Cas. 773, 102 N. W. 1; *Russell v. Place*, 94 U. S. 606, 24 L. ed. 214; *Lockett v. Lindsay*, 1 Ida. 324.) At most, the former case was "merely illusory and supposititious, and hence it cannot be considered as identical, in any just sense of the term, with the true cause of action

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correctly set up and supported by a right theory of the facts." (Black on Judgments, sec. 733.)

The defense of the statute of limitations is based upon subd. 2, sec. 4054, Rev. Codes, which limits the time within which an action may be brought for trespass upon real property to three years. That section has no application to the case at bar. This is not an action for trespass on real property, but is an action on the case for consequential damages. The authorities cited both by appellant and respondent support this view. Appellant did not build its breakwater upon the land of respondent, but upon its own land, or at least where it had a lawful right to construct a breakwater, and this act did not constitute a trespass upon the lands of respondent. The resulting injury to respondent was necessarily consequential, and not the immediate result of any wrongful force directly applied by appellant to respondent's lands. The very elements of trespass to real property are lacking. (*Hicks v. Drew*, 117 Cal. 305, 49 Pac. 189; *Daneri v. Southern California Ry. Co.*, 122 Cal. 507, 55 Pac. 243; *Crim v. City & County of San Francisco*, 152 Cal. 279, 92 Pac. 640; *Denney v. City of Everett*, 46 Wash. 342, 123 Am. St. 934, 89 Pac. 934; *Suter v. Wenatchee etc. Power Co.*, 35 Wash. 1, 102 Am. St. 881, 76 Pac. 298; 1 C. J. 996; 11 C. J. 4. For an instructive consideration of an action upon the case, see 1 Bouvier's Law Dict., Rawle's 3d ed., p. 425, citing numerous cases.)

Respondent has suggested that the sections of the code which govern this case are 4053 and 4060, respectively. We are inclined to the view that the latter section is the only one which has any application. It provides: "An action for relief not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued." Sec. 4053, Rev. Codes, was evidently intended to limit actions upon contract or upon matters of a contractual nature, not founded upon a written instrument. Clearly, this case was not barred under either of these sections.

It is contended by appellant that the statute of limitations began to run in 1911, when the construction of the city's breakwater was commenced, and not in April, 1912, when the

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first damage occurred, as contended by respondent. Where the damage is not a direct but only a consequential result of a defendant's act no cause of action arises until injury has been done or actual damage inflicted. (*Rogers v. Oregon-Washington Ry. & Nav. Co.*, 28 Ida. 609-624, 156 Pac. 98; *Hill v. Empire State-Idaho Mining & Developing Co.*, 158 Fed. 881.) Respondent alleged, and in the face of the record it must be regarded as a determined fact, that the first damage was done in April, 1912, and following the rule announced in the cases last cited, the statute of limitations would not begin to run until that time. As this action was begun January 18, 1915, it is therefore apparent that there is no merit in appellant's defense on this ground.

Appellant urges that in constructing the breakwater to protect its park it had no lawful authority to do any more than erect such a barrier as would prevent its lands from being overflowed or damaged, or such as would keep the river within its natural channel, and that its acts in going beyond what was necessary to accomplish this purpose and in placing within the stream obstructions which tended to divert the river from its natural channel, were *ultra vires* and beyond the scope of its powers, either express or implied. Sec. 42 of the Charter of Boise City, as amended by Sess. Laws 1909, p. 113, gives the mayor and common council power to establish, maintain and improve parks within or without the corporate limits of the city. The city would have implied authority to take whatever lawful means were necessary to accomplish this end. (*Wilson v. Boise City*, 6 Ida. 391, 55 Pac. 887.) While there is much conflict in the authorities as to just what acts of a municipal corporation are *ultra vires*, the rule, applicable to the facts in this case, is generally well settled, and is stated by McQuillin thus: "The defense of *ultra vires* can be interposed only where the act complained of was wholly beyond the powers of the municipality. If the wrongful act in question is one which the municipality had the right to do under some circumstances or in some manner, then it is not *ultra vires*." (McQuillin, *Mun. Corp.*, sec. 2637; *Dillon, Mun. Corp.*, 5th ed., sec. 1648.) Even in the

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absence of the charter provisions above quoted the city would have an unquestionable legal right to erect such barriers as would adequately protect its property from the ravages of the river, but such right is subject to the same limitations as the same right of any other riparian owner. It is apparent that the action of the city in constructing its breakwater for the purpose of affording protection to its property was not an action wholly beyond the powers of the municipality. Under the circumstances, the city had the right to in some manner construct a breakwater, which would prevent the flooding, erosion and consequent damage to its lands. Having exercised that right, it cannot now be heard to defend upon the theory that some of the things or acts which it did in the exercise of that right were in excess of its lawful authority and *ultra vires*.

It remains to consider the chief objection urged by appellant to respondent's right to recover. This question was raised by the appellant's general demurrer. Appellant insists that even though the defenses of election of remedies, statute of limitations, *res adjudicata* and *ultra vires* should fail, still the city is not liable in any event. The contention is, that in building its breakwater for the purpose of protecting one of the city's public parks the city was exercising a governmental function and would not be liable for any damage which might result from its action while in the exercise thereof. The extent to which municipalities are legally responsible for torts has been the subject of endless litigation. The result of the decisions from the various jurisdictions presents no rule which can be regarded as uniform. To attempt an analysis of these rules or to discuss the cases adhering to the various diverging rules would be a task altogether beyond the necessary scope of this opinion. Some jurisdictions make the test of the city's liability depend upon whether or not the tort was one which arose in some business which the municipality was carrying on for which it receives some revenue, such as municipally owned waterworks, lighting systems, transportation facilities and the like.

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An examination of our own decisions renders it clear that no such test can be regarded as decisive in determining the liability of municipalities for their torts in this state, for municipalities have uniformly been held liable in this jurisdiction for defective streets. (*Carson v. City of Genesee*, 9 Ida. 244, 108 Am. St. 127, 74 Pac. 862; *Moreton v. St. Anthony*, 9 Ida. 532, 75 Pac. 262; *Miller v. Village of Mullan*, 17 Ida. 28, 19 Ann. Cas. 1107, 104 Pac. 660; *Powers v. Boise City*, 22 Ida. 286, 125 Pac. 194; *Village of Sandpoint v. Doyle*, 11 Ida. 642, 83 Pac. 598, 4 L. R. A., N. S., 810; *City of Kellogg v. McRae*, 26 Ida. 73, 141 Pac. 86; *Beaton v. City of St. Maries*, 27 Ida. 638, 151 Pac. 996; *Dillon, Mun. Corp.*, 5th ed., sec. 1638 et seq.) In a certain sense any municipal function might be regarded as governmental, but the term, when properly applied to the subject here under consideration, should limit governmental functions to "legal duties imposed by the state upon its creature, which it may not omit with impunity but must perform at its peril. . . . They are all imposed by statute, and are necessarily mandatory or peremptory functions, . . . The officers performing these duties and exercising these powers are rather officers of the state than of the municipality, and as such are liable to state control." (28 Cyc. 267.) The celebrated case of *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332, wherein the subject is given a most scholarly review by Chief Justice Gray, although placing additional limitations upon municipal liability for torts, will be found, upon careful examination, under the facts there involved, not to be out of harmony with what we believe to be the more sound rule, above quoted from Cyc. In that case the injury complained of resulted from a defective stairway in one of the city's school buildings. An imperative legal duty rested upon the city to maintain the schools and school buildings as a portion of the city school system. And while it is true that the opinion gave as an additional reason for its decision, that the corporation received no profit or special advantage from the performance of the legal duty, we are inclined to the view that this was placing an additional limitation upon the liability of the municipality neither

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strictly sound on principle nor necessarily involved under the particular facts of the case. The previous decisions of our own court, while not expressly in point with the case at bar, are strongly analogous in principle and are in harmony with the rule above announced. (*Wilson v. Boise City*, *supra*; *Willson v. Boise City*, 20 Ida. 133, 117 Pac. 115, 36 L. R. A., N S., 1158.)

The maintenance of public parks is not made an absolute or imperative duty by the provisions of the charter of Boise City here invoked. The mere grant to the city of power or authority to maintain a public park enjoins no absolute duty upon the city to do so, but merely confers the privilege by extending the lawful corporate authority of the city in such case. The care and maintenance of parks is primarily a private as opposed to a governmental function. (28 Cyc. 1311; *City of Denver v. Spencer*, 34 Colo. 270, 114 Am. St. 158, 7 Ann. Cas. 1042, 82 Pac. 590, 2 L. R. A., N. S., 147; *Gartland v. New York Zoological Society*, 135 App. Div. 163, 120 N. Y. Supp. 24; *Capp v. City of St. Louis*, 251 Mo. 345, Ann. Cas. 1915C, 245, 158 S. W. 616, 46 L. R. A., N. S., 731; *Weber v. City of Harrisburg*, 216 Pa. St. 117, 64 Atl. 905; *Lowe v. Salt Lake City*, 13 Utah, 91, 57 Am. St. 708, 44 Pac. 1050; *Mayor of Detroit v. Park Commrs.* (*Moran*), 44 Mich. 602, 7 N. W. 180.)

While there are cases which hold to a contrary doctrine, for the reasons above given we are satisfied that we are announcing the correct rule. Most of the cases touching the question of municipal liability for torts with respect to parks have arisen where the facts were materially different than in the case at bar. The question has usually arisen where some injury occurred within the park; manifestly those cases can throw little light upon the serious question here involved. The question here is whether or not the city has incurred liability by so constructing its breakwater as to cause resulting damage to the opposite riparian owner. As we view the matter, the character, class or kind of municipal property which it was sought to safeguard or protect by the construction of the breakwater has no material bearing upon the real

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✓ issue. So far as the city's liability in this case is concerned, it stands in no different situation than any other riparian owner. As such it had the undoubted right, if it so desired, to construct the breakwater for the protection of its property, but in so doing it had no right to so obstruct the stream as to divert it and injure the property of another riparian owner, and if damage resulted therefrom the city was clearly liable. ✓
(*Geurkink v. City of Petaluma*, 112 Cal. 306, 44 Pac. 570; *Fischer v. Davis*, 19 Ida. 493, 116 Pac. 412; 24 Ida. 216, 133 Pac. 910; *Boise Development Co. v. Idaho Trust etc. Bank*, 24 Ida. 36, 133 Pac. 916; *Rogers v. Oregon-Washington R. & Nav. Co.*, *supra*; *Hill v. City of Boston*, *supra*; *Hill v. Empire State-Idaho Mining & Development Co.*, *supra*.)

✓ Nor does the city's liability in such cases rest solely upon the narrow ground of negligence, but rather upon the broad legal principle that no one is permitted to so use his own property as to invade the property rights or cause injury or damage to the property of another. ✓ (Dillon, Mun. Corp., 5th ed., sec. 1638; McQuillin, Mun. Corp., secs. 2702, 2704; *Ordway v. Village of Canistota*, 66 Hun, 569, 21 N. Y. Supp. 835; *Brown v. City of Ithaca*, 148 App. Div. 477, 132 N. Y. Supp. 1041; *Geurkink v. City of Petaluma*, *supra*; *Martin v. St. Joseph*, 136 Mo. App. 316, 117 S. W. 94.)

Having examined all the material errors assigned, we are satisfied that every legal objection raised by appellant must be resolved in favor of respondent. The judgment is affirmed. Costs awarded to respondent.

Morgan, J., concurs in the conclusion reached.

Rice, J., concurs.

Argument for Appellants.

(September 29, 1917.)

J. A. JOHNSON, Respondent, v. C. E. HOLDERMAN and
LENA O. HOLDERMAN, Appellants.

[167 Pac. 1030.]

FRAUD—MISREPRESENTATIONS—SCIENTER.

1. In an action based upon fraudulent representations it must be shown, among other things, that the party making them knew them to be false or that he made them recklessly without knowledge of their truth or falsity.

2. A representation believed on reasonable grounds, by the party making it, to be true, is not fraudulent.

[As to the defendant's knowledge of the fallacy as essential condition to his being liable for fraud, see note in 18 *Am. St.* 559.]

APPEAL from the District Court of the Fourth Judicial District, for Twin Falls County. Hon. James R. Bothwell, Judge.

Action to foreclose mortgage. Judgment for plaintiff.
Affirmed.

Guthrie & Bowen and John E. Davies, for Appellants.

A person may commit a fraud by asserting as a fact that which he merely believes. (20 Cyc. 19-27.)

He who affirms either what he does not know to be true, or knows to be false, to another's prejudice and his own gain, is both in morality and in law guilty of falsehood, and must answer in damages. (*Munroe v. Pritchett*, 16 Ala. 785, 50 Am. Dec. 203; *Mayer v. Salazar*, 84 Cal. 646, 24 Pac. 597; *Lahay v. City Nat. Bank of Denver*, 15 Colo. 339, 22 Am. St. 407, 25 Pac. 704; *Stimson v. Helps*, 9 Colo. 33, 10 Pac. 290; *Goodale v. Middaugh*, 8 Colo. App. 223, 46 Pac. 11; *Kansas Ref. Co. v. Pert*, 3 Kan. App. 364, 42 Pac. 943; *Cawston v. Sturgis*, 29 Or. 331, 43 Pac. 656.)

It is not necessary that the speaker should actually know that his representation is false. If the statement is of a mat-

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ter susceptible of accurate knowledge and he makes it recklessly, without any knowledge of its truth or falsity, and in the form of a positive assertion calculated to convey the impression that he knows it to be true, the representation is equally fraudulent. (20 Cyc. 27; *Cawston v. Sturgis, supra.*)

E. A. Walters and Taylor Cummins, for Respondent.

If representations in regard to water supply had in fact been made, they would not be actionable, because they could have been nothing more than pure statements of opinion as to something that might transpire in the future. Further than that, the means of investigation were equally open to appellants, and they did in fact make independent investigations, the effect of which would be to completely relieve respondent from liability. (*Buschman v. Codd*, 52 Md. 202; *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411; *Frenzel v. Müller*, 37 Ind. 1, 10 Am. Rep. 62; *Board of Commrs. of San Jose v. Younger*, 29 Cal. 172, 176; *Yeates v. Pryor*, 11 Ark. 58; *Brown v. Bledsoe*, 1 Ida. 746; *Leavitt v. Fletcher*, 60 N. H. 182; *Rockafellow v. Baker*, 41 Pa. St. 319, 80 Am. Dec. 624; *Slaughter v. Gerson*, 13 Wall. (80 U. S.) 379, 20 L. ed. 627; *Farnsworth v. Duffner*, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. ed. 931; *Ludington v. Renick*, 7 W. Va. 273.)

In matters regarding the future, representations generally are not actionable. (*Sawyer v. Prickett*, 19 Wall. (86 U. S.) 146, 22 L. ed. 105; *Richardson v. Noble*, 77 Me. 390; *Vawter v. Ohio & M. R. Co.*, 14 Ind. 174; *Hawkins v. Campbell*, 6 Ark. 513; *St. Louis, I. M. & S. Ry. Co. v. Neely*, 63 Ark. 636, 40 S. W. 130, 37 L. R. A. 616; *Gallager v. Brunel*, 6 Cow. (N. Y.) 346, 347; *Saunders v. McClintock*, 46 Mo. App. 216.)

A statement that a dam will continue to furnish the amount of water conveyed to a vendee is a mere matter of opinion. (*Orr v. Goodloe*, 93 Va. 263, 24 S. E. 1014; *Moore v. Barksdale* (Va.), 25 S. E. 529.)

MORGAN, J.—This action was instituted by respondent to foreclose a mortgage given to secure the payment of

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\$1,450, being a part of the purchase price of certain Carey Act land, sold by respondent to appellants, situated in Twin Falls county. Appellants filed a cross-complaint alleging damage by reason of misrepresentations made by respondent, whereby they were induced to purchase the land and water rights appurtenant thereto. The misrepresentations complained of were to the effect that the water rights conveyed would insure a supply of water sufficient to properly irrigate the land and not less than one-half miner's inch per acre, continuous flow, from April 1st to November 1st, each year, or $2\frac{3}{4}$ acre-feet, annually, measured at or within one-half mile of the land; that the land could be well irrigated by conducting the water over it in ditches from one corner. Appellants claimed that the representations were false, in that the amount of water obtainable was far less than that represented and not sufficient to properly irrigate the land; that it could not be irrigated in the manner represented, and that, in order to get such water as could be procured upon the land, it was necessary for them to construct a large and expensive dike; that the representations were fraudulent for the reason that they were made by respondent recklessly, without knowledge of their truth or falsity.

The issues presented by the cross-complaint were submitted to a jury. Evidence concerning representations as to the manner in which the land could be irrigated was admitted. Evidence of representations as to the amount of water available was offered, but rejected. The jury found for appellants in the sum of \$250, which was deducted from the amount found by the court to be due upon the indebtedness secured by the mortgage, and a decree of foreclosure was rendered from which this appeal was taken.

The question here involved is whether the court erred in rejecting appellants' offer to prove that prior to the sale and during the negotiations leading up to it, respondent represented that he had lived in the vicinity of the land for several years; was acquainted with conditions regarding the water supply upon the Salmon river tract, which included his land, and that appellants could rely upon receiving the

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amount of water represented in the contracts appurtenant to it, being exhibits 1, 3, 4, 5 and 6; that under these contracts he was entitled to receive $2\frac{3}{4}$ acre-feet of water per annum, which would be an ample supply; that such representations were relied upon by appellants, but were false in that the water supply available was less than that set out in the contracts and was insufficient to furnish $3\frac{3}{4}$ acre-feet per annum, or any amount necessary to irrigate the land; that respondent did not have any knowledge of the truth or falsity of his representations at the time he made them.

The contracts, above mentioned, were offered in evidence and were rejected with the offer of proof. Exhibit No. 6 is an agreement between the state of Idaho and the irrigation company reciting, among other things, that the company bound itself to build a reservoir with a capacity of 180,000 acre-feet of water, which had been determined to be sufficient, with the normal flow of the Salmon river, to furnish $2\frac{3}{4}$ acre-feet per annum for the land to be irrigated; that the certificates of shares of stock to be issued to the settler should entitle him to a water right of 1/100 cubic-foot per second for each acre of land, and that the system should be constructed in such a manner as to insure delivery of such an amount. The other contracts were entered into between the owners of the land and the irrigation company, and provided, among other things, that the owner should receive 1/100 cubic-foot of water per second per acre. The evidence discloses the fact that at the time of the sale the land was in process of being prepared for irrigation, and that it had never been irrigated; also that appellants, at the time they purchased, knew this fact. The offer of proof was properly rejected.

To support an action based on a false representation, scienter must be proved, that is, the representation must have been false to the knowledge of the person who made it, or must have been made, as a positive assertion calculated to convey the impression that he had actual knowledge of its truth, when in fact he was conscious he had no such knowledge. If the speaker honestly believed his representation to be true, he is not liable; an honest mistake, or error in judg-

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ment, being regarded as insufficient grounds on which to base a charge of fraud. (20 Cyc. 24.) It is true that if a representation is made recklessly, without any knowledge of its truth or falsity, an action will lie, but not where such representation is made in the belief that it is true and such belief is founded upon reasonable grounds. (*Parker v. Herron*, 30 Ida. 321, 164 Pac. 1013; *Farmers' Stock-Breeding Assn. v. Scott*, 53 Kan. 534, 36 Pac. 978; *Toner v. Meussdorffer*, 123 Cal. 462, 56 Pac. 39; *Hodgkins v. Dunham*, 10 Cal. App. 690, 103 Pac. 351; *Kountze v. Kennedy*, 147 N. Y. 124, 49 Am. St. 651, 41 N. E. 414, 29 L. R. A. 360; *Barker v. Scandinavian-American Bank* (Wash.), 166 Pac. 618.)

In their offer of proof appellants claimed that respondent had no knowledge of the truth or falsity of the representations when he made them, but the contracts offered in evidence disclose that he had reasonable grounds to believe the representations were true. The irrigation company had contracted to build a reservoir which, with the natural flow of the Salmon river, would contain water sufficient to furnish $2\frac{3}{4}$ acre-feet, the amount alleged to have been represented by him to be available. The contract with the state also bound the company to construct works sufficient to deliver 1/100 cubic-foot per acre per second to the settlers, while the contract between the owner of the land and the company called for the last-mentioned amount of water. Knowing these facts, respondent had reasonable grounds for a belief in the truth of his representations, and appellants did not prove, or offer to prove, that a shortage of water had been discovered up to that time, or that he did not believe the representations to be true, or that he knew of anything, or could have known of anything, inconsistent with a belief in their truth.

The judgment is affirmed and costs are awarded to respondent.

Budge, C. J., and Rice, J., concur.

Argument for Appellant.

(October 1, 1917.)

TIMOTHY DORE, as Special Deputy State Bank Commissioner of the **LEADORE STATE BANK**, Appellant, v. **MORRIS H. COTTOM**, Respondent.

[167 Pac. 1164.]

INSTRUCTIONS—CONFLICTING EVIDENCE—SUFFICIENCY OF.

1. *Held*, that the instructions requested by appellant and refused, also the instructions given, disclose no error prejudicial to appellant.
2. The evidence in this case is conflicting, and, under the theory upon which the case was tried, sufficient to support the verdict and judgment.

APPEAL from the District Court of the Sixth Judicial District, for Lemhi County. Hon. James R. Bothwell, Presiding Judge.

Action to recover the par value of certain bank stock alleged to have been held by a stockholder of an insolvent state bank. Judgment for plaintiff. *Affirmed*.

E. W. Whitcomb, for Appellant.

The first subdivision of instruction No. 3 was wrong in requiring the plaintiff to prove that the defendant knew the bank was insolvent at the time of the transfer. The rule does not go that far, and the courts are uniform in holding that if actual knowledge cannot be known on the part of the defendant, then proof that he knew that the bank was in a failing condition, or that he had reason to believe that it was insolvent or about to fail, or words of equivalent meaning, would be sufficient. (*Bowden (Adams) v. Johnson*, 107 U. S. 251, 261, 2 Sup. Ct. 246, 27 L. ed. 386, 389; *Pauly v. State Loan & Trust Co.*, 165 U. S. 606, 623, 17 Sup. Ct. 465, 41 L. ed. 844, 851; *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. ed. 448, 450; *Aultman's Appeal*, 98 Pa. St. 505; *Stuart v. Hayden*, 169 U. S. 1, 18 Sup. Ct. 274, 42 L. ed. 639, 641;

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McDonald v. Dewey, 202 U. S. 510, 6 Ann. Cas. 419, 26 Sup. Ct. 731, 50 L. ed. 1128, 1133; *Cox v. Montague*, 78 Fed. 845, 849, 24 C. C. A. 364.)

Stevens & Clute and A. C. Cherry, for Respondent.

The jury is the judge of the facts, and its determination, so far as the facts are concerned, is final and conclusive; provided, there is some evidence to support the verdict of the jury. (*Lott v. Oregon Short Line R. Co.*, 23 Ida. 324, 130 Pac. 88; *Quirk v. Sunderlin*, 23 Ida. 368, 130 Pac. 374; *Denbeigh v. Oregon Wash. R. & Nav. Co.*, 23 Ida. 663, 132 Pac. 112.)

The instructions, as a whole, fairly submit the case to the jury, and in such case the verdict will not be disturbed. (*Lufkins v. Collins*, 2 Ida. 256, 10 Pac. 300.)

BUDGE, C. J.—This action was brought by the appellant as special deputy state bank commissioner, in charge of the affairs of the Leadore State Bank at Leadore, Idaho, against the respondent, who was one of the stockholders thereof, to recover the sum of one thousand dollars, or the par value of ten shares of stock alleged to have been held by him in said bank, together with interest thereon from the twenty-ninth day of May, 1915, that being the date payment of said sum was demanded. The cause was tried before a jury, who returned a verdict in favor of appellant for the par value of one share of stock and interest.

This appeal is from the judgment. It is the contention of the appellant that if certain evidence had not been admitted and the jury had been correctly instructed on the law of the case, a verdict would have been returned for the full value of the ten shares.

We have examined the instructions requested by appellant and refused, and also the instructions given, and find no error with respect to either, prejudicial to appellant. The other assignments of error relied upon by appellant have been examined, but in view of the record in this case they are

Points Decided.

without merit. The evidence is conflicting, but under the theory upon which the case was tried is sufficient to support the verdict and judgment.

Finding no prejudicial error in the record, the judgment of the trial court is affirmed. Costs awarded to respondent.

Morgan and Rice, JJ., concur.

(October 1, 1917.)

THE PEOPLE OF THE STATE OF IDAHO, by JOHN E. REES, Prosecuting Attorney, Appellant, v. OLIVE KADLETZ, Respondent.

[167 Pac. 1161.]

QUO WARRANTO—QUALIFICATIONS OF COUNTY SUPERINTENDENT OF PUBLIC INSTRUCTION—TEACHER'S CERTIFICATE.

1. When the law prescribes the qualifications necessary for a person to become eligible to the office of county superintendent of public instruction, and included among such qualifications is a requirement that a candidate for the office must be a holder of a state or state life certificate, a certificate is intended which at least meets the requirements specified in the law for state certificates.

2. The constitution of this state provides that the qualifications for the office of county superintendent of public instruction shall be fixed by law.

3. A certificate issued by the state board of education, good for two years and not valid in high schools, cannot be said to be a state certificate within the meaning of the statutes of this state.

4. A certificate issued by the county superintendent of public instruction in 1898, valid for three years in all schools of the state, must be held to be of a lower grade than a state certificate within the meaning of the law prescribing the qualifications of county superintendent of public instruction.

[As to *quo warranto* proceedings involving a public office, see note in 125 Am. St. 635.]

APPEAL from the District Court of the Sixth Judicial District, for Lemhi County. Hon. F. J. Cowen, Judge.

Opinion of the Court—Rice, J.

Action in *quo warranto*. Judgment for defendant. *Reversed*.

John E. Rees and E. W. Whitcomb, for Appellant.

The legislature has no constitutional right to delegate its powers to the state board of education. The law is fundamental on this point. (6 R. C. L. 164, 165, and cases cited; 8 Cyc. 830-834, and cases therein cited.)

There is much reputable authority holding that Mrs. O'Brien was the duly elected official at the last election, even though receiving a minority vote, but the authorities are generally the other way in the United States. (15 Cyc. 391, C.)

L. E. Glennon, for Respondent.

The statutes grant to the state board of education authority to issue teacher's certificate, and any misconception of the board as to the statute will not invalidate a certificate granted. The presumption of law is in favor of every official act, and every teacher's certificate granted by the state board of education is presumed to be a valid certificate. (16 Cyc. 1076, and cases cited.)

The board of education exercised the discretionary power vested in it by statute, and found the respondent entitled to the certificate issued to her. The action of the board in so doing is not subject to collateral attack. (*School Dist. No. 25 v. Stone*, 14 Colo. App. 211, 59 Pac. 885; *Kimball v. School Dist. No. 122*, 23 Wash. 520, 63 Pac. 213; *People v. Board of Aldermen*, 18 Misc. Rep. 533, 42 N. Y. Supp. 545.)

RICE, J.—This is a proceeding in *quo warranto* brought for the purpose of ousting the respondent from the office of county superintendent of public instruction for Lemhi county, which it is alleged she holds without authority of law and which she wrongfully and unlawfully withholds from one Clara Diggle O'Brien. It is stipulated that the respondent was elected at the regular election held in Lemhi county,

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November 7, 1916, and that she had all the necessary qualifications to hold the office of county superintendent of public instruction in this state, provided she held the teacher's certificate required by law.

The certificate held by the respondent reads as follows:

"PROVISIONAL STATE CERTIFICATE.

"This certifies that Olive Kadletz has complied with the requirements of the Resolution adopted by the State Board of Education June 13, 1913, and is granted this Provisional State Certificate, which entitles the holder to teach in the public schools of the State of Idaho for a period of two years from date.

"Given at Boise, Idaho, this 3rd day of October, 1913.

"(Sgd.) GRACE M. SHEPHERD,
"Sup't of Public Instruction.

"(Seal) EDWARD O. SISSON,
"State Comm'r of Education.
"WALTER S. BRUCE,
"President, State Board of Education.

"Not valid in High Schools.

"Endorsed: The within certificate is hereby renewed for a period of two years from date of expiration and is now valid until 10—3—1917.

"BERNICE McCOY,
"State Sup't. Schools.

"6—21—16."

It is further admitted that the respondent has taught school for more than two years, one of which years was while holding the above certificate.

It is further stipulated that Clara Diggles O'Brien was a candidate for the office of county superintendent of public instruction at the same election, and received next to the highest number of votes. She held a first grade county certificate issued by the county superintendent of public instruction of Bingham county on September 1, 1898, which was good for three years from date. Under this certificate she

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taught for a period of three years. On the third day of March, 1913, she was granted a state certificate, under which last-mentioned certificate she taught for a period of four months.

The only question presented in this case is as to the necessary qualifications for nomination and election to the office of county superintendent of public instruction. Section 6 of art. 18 of the constitution provides that the salary and qualifications of county superintendent shall be fixed by law. Section 3 of chap. 115, Sess. Laws 1913, p. 436, provides:

“ Provided, that no person shall be eligible to the office of County Superintendent of Public Instruction unless he be, at the time of his nomination or appointment a qualified elector of the county from which he is nominated or appointed, of the age of twenty-five years, a holder of a state or state life certificate, a teacher of not less than two years actual experience and service as a teacher in the schools of Idaho, one of which year's experience must have been while holding a valid certificate of a grade not lower than a state certificate.”

Section 90-A of chap. 153, Sess. Laws 1915, p. 327, provides:

“The certificates issued by the State Board of Education shall be State Certificates and Specialists' State Certificates, each of which shall be valid for eight years, and State Life Certificates valid for life, unless revoked for cause, and State High School Certificates, as hereinafter provided.”

Section 90-B of the same act provides:

“State Life Certificates and State Certificates shall be valid in all schools and grades.”

The statutory provisions quoted are amendments to the school code passed by the legislature in 1911. They are parts of the same act and should be construed together. While sections 90-A and 90-B, perhaps, do not properly define state certificates and state life certificates, they do provide that a state certificate shall be valid for eight years and shall be valid in all schools and grades. We must conclude, therefore, that when the law prescribed the qualifications neces-

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sary for a person to become eligible to the office of county superintendent, and included among such qualifications is a requirement that the candidate for the office must be a holder of a state or state life certificate, a certificate was intended which at least was valid for eight years and valid in all schools and grades in the state. The certificate of respondent does not meet either requirement.

Counsel for respondent contend that the law requires simply a state certificate in order to render one eligible to the office of county superintendent, without any requirement as to any kind or grade of state certificate.

It is not necessary to determine whether the state board of education possessed the authority to issue such a certificate as was awarded to the respondent in this case, but to hold that a certificate issued by the state board of education, which does not meet the requirements the law declares shall inhere in state certificates, renders the holder thereof eligible for the office of county superintendent, is tantamount to holding that the state board of education rather than the legislature may fix the qualifications for county superintendent of public instruction. This would be contrary to the constitutional provision above quoted. The respondent therefore lacks one of the essential qualifications necessary to hold the office in question, and the judgment of the trial court on that point must be reversed.

The plaintiff seeks to have a decree entered declaring the said Clara Diggles O'Brien entitled to the office in question. The only certificate held by Mrs. O'Brien under which she had the requisite experience was a first grade certificate issued by the superintendent of public instruction of Bingham county. It cannot be held that this certificate is not of a lower grade than a state certificate. The comparison must be made with the state certificate provided for by the law above quoted. It would seem that her certificate at the time of its issuance was of a lower grade than a state certificate, which was also provided for at that time. As Mrs. O'Brien does not possess the requisite qualifications to hold the office of county super-

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intendent of public instruction, no decree can be entered in her favor.

The judgment is reversed, with instructions to enter a decree declaring the office of county superintendent of public instruction for Lemhi county vacant. Costs awarded to appellant.

Budge, C. J., and Morgan, J., concur.

(October 1, 1917.)

EVANS STATE BANK, a Corporation, Respondent, v.
MARGARET SKEEN, LAFAYETTE SKEEN et al.,
Appellants.

[167 Pac. 1165.]

APPEAL AND ERROR—NONAPPEALABLE ORDERS—DISMISSAL

Neither an order appointing a receiver of mortgaged personal property, an order denying and overruling a motion to vacate and set aside the receivership, nor an order authorizing and directing the sale of the property, is a final judgment, but such orders are interlocutory and are not reviewable upon direct appeal therefrom.

APPEAL from the District Court of the Fifth Judicial District, for Power County. Hon. J. J. Guheen, Judge.

Appeal from an order appointing a receiver, an order denying and overruling a motion to vacate and set aside the receivership and an order authorizing and directing the sale of property held thereunder. *Dismissed.*

Maurice M. Myers, for Appellants.

Said orders are final orders or decisions and are not appealable to this court by direct appeal. (*Chemung Mining Co. v. Hanley*, 11 Ida. 302, 81 Pac. 619.)

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Isaac E. McDougall and McDougall & Jones, for Respondent.

MORGAN, J.—This case comes before the court upon appeal from an order appointing a receiver of mortgaged personal property, an order denying and overruling a motion to vacate and set aside the receivership and an order authorizing and directing the sale of the property. Respondent has moved for a dismissal upon the ground, among others, that the orders are not final, but interlocutory, and that neither of them is reviewable upon direct appeal therefrom. Any additional facts necessary to an understanding of what will be said in disposing of this motion are to be found in *Skeen v. District Court*, 29 Ida. 331, 158 Pac. 1072.

The right to appeal, in this state, is conferred by legislative authority, and if it exists it must be found in the constitution or statutes. It has been contended that all orders and decisions of district courts are made appealable by sec. 9, art. 5, of the constitution, wherein it is provided that the supreme court shall have jurisdiction to review, upon appeal, any decision of the district courts, or the judges thereof, but this section must be read and considered together with sec. 13 of the same article, directing that the legislature shall provide a proper system of appeals.

In the discharge of the duty imposed upon it by sec. 13, art. 5, of the constitution, above mentioned, the legislature, in sec. 4800, Rev. Codes, has provided: "A judgment or order, in a civil action, except when expressly made final, may be reviewed as prescribed in this Code, and not otherwise." Sec. 4807, Rev. Codes, as amended by chap. 111, Sess. Laws 1911, p. 367, and by chap. 80, Sess. Laws 1915, p. 193, designates the judgments and orders of district courts from which appeals may be taken to this court and they are: A final judgment in an action or special proceeding commenced in the court in which the same is rendered; a judgment rendered on appeal from an inferior court; a judgment

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rendered on an appeal from an order, decision or action of a board of county commissioners; an order granting or refusing to grant a new trial; an order granting or dissolving an injunction; an order refusing to grant or dissolve an injunction; an order dissolving or refusing to dissolve an attachment; an order granting or refusing to grant a change of place of trial; any special order made after final judgment; and an interlocutory judgment in actions for partition of real property. While other legislative enactments provide for appeals from the district courts to this court in certain cases, none of them apply to the question here under consideration.

A final judgment has been defined to be one which disposes of the subject matter of the controversy or determines the litigation between the parties on its merits. A judgment, order or decree which is intermediate or incomplete and, while it settles some of the rights of the parties, leaves something remaining to be done in the adjudication of their substantial rights in the case by the court entertaining jurisdiction of the same, is interlocutory. (3 C. J. 441.) Applying these definitions to the orders here attempted to be appealed from, it will be seen at once that they are interlocutory and not final. An examination of sec. 4807, Rev. Codes, as amended, discloses that no appeal has been provided for from an order appointing a receiver, from an order denying and overruling a motion to vacate a receivership or from an order authorizing and directing the sale of property held thereunder. We conclude, therefore, that these orders are not appealable and that the motion to dismiss must be sustained.

Counsel for appellant relies upon an observation made by this court in the case of *Chemung Mining Co. v. Hanley*, 11 Ida. 302, 81 Pac. 619, as follows: "Under the provisions of section 9, article 5, of our constitution, this court has jurisdiction to review, upon appeal, any decision of the district court or the judges thereof. An order granting or refusing a motion for the appointment of a receiver is a decision, and such decision is appealable; therefore the order of the district court denying the appointment of a receiver in this

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case is an appealable order." The foregoing quotation is misleading and, if capable only of the construction which its language, read and unexplained, seems to justify we would not hesitate to expressly overrule it. But this court in *Utah Assn. of Credit Men v. Budge*, 16 Ida. 751, 102 Pac. 390, 691, after quoting the statement from *Chemung Mining Co. v. Hanley*, above recited, said: "That holding seems to have been construed by some to mean that an appeal may be taken directly from any order or decision that a district court can make. This is entirely erroneous. The constitution does not so provide. It authorizes and empowers this court to review upon appeal any decision that a district court may make, but it does not give a direct appeal from every order and decision a trial court makes. If that view prevailed, there would be no such thing as reaching a final judgment in a trial court in a contested case in any reasonable length of time. If causes were tied up from time to time until an appeal could be taken from every order and decision made by the court in the course of a trial, there would be no end to a case. The constitution does not mean any such thing. It does mean, however, that when an appeal is taken from an appealable order or judgment, that this court has the jurisdiction and authority to review any and all orders and decisions made by the trial court to which the party has duly excepted and preserved his objection and exception in the manner and form provided by law." (See, also, *Mahoney v. Elliott*, 8 Ida. 356, 69 Pac. 108; *Maple v. Williams*, 15 Ida. 642, 98 Pac. 848; *Weiser Irr. District v. Middle Valley etc. Ditch Co.*, 28 Ida. 548, 155 Pac. 484.)

In *Keane v. Kibble*, 28 Ida. 274, 154 Pac. 972, a case very much like the one here under consideration, this court inadvertently entertained an appeal from an order appointing a receiver and from an order denying a motion to set aside the appointment. In that case no motion to dismiss was made nor was the right to appeal from the orders in any manner questioned, and the point here decided escaped the attention of the court. Had a motion been made to dismiss

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the appeal upon the ground that the orders were not appealable, it would have been sustained.

The appeal is dismissed. Costs are awarded to respondent.

Budge, C. J., and Rice, J., concur.

(October 1, 1917.)

CHARLES H. LAMBERTON, Plaintiff, v. CHARLES P. MCCARTHY, as Judge of the District Court of the Third Judicial District of the State of Idaho, Defendant.

[168 Pac. 11.]

MANDAMUS—JUDGMENTS—FINALITY.

1. A writ of mandate will not issue where the party seeking it has a plain, speedy and adequate remedy at law.

2. A final judgment is one which disposes of the subject matter of the controversy or determines the litigation between the parties on its merits.

3. If that which may come before the court for further action is necessary for carrying the judgment or decree into effect, or is merely in execution thereof, it is final and appealable.

[As to one's right to apply for the writ of *mandamus* against judicial officer where having right to appeal, see note in 98 *Am. St.* 891.]

PETITION for writ of mandate. *Denied.*

A. A. Fraser, for Petitioner.

The so-called judgment heretofore entered is null and void, for the reason that it is not sustained by the pleadings, nor the findings of fact made by the court.

In an action of this character no personal judgment can be rendered against a copartner until all the assets of the copartnership have been sold and the proceeds derived therefrom distributed among the parties as their several interests may appear. (Bates on Partnerships, sec. 973; *Rosenstiel v.*

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Gray, 112 Ill. 282, 286; *Moran v. McInerney*, 129 Cal. 29, 61 Pac. 575; *Clark v. Hewitt*, 136 Cal. 77, 68 Pac. 303; *Stower v. Kamphefner*, 6 Cal. App. 80, 91 Pac. 424.)

The purported judgment is void on account of its ambiguity and uncertainty. (*Wallace v. Farmers' Ditch Co.*, 130 Cal. 578, 62 Pac. 1078; *Gregory v. Blanchard*, 98 Cal. 311, 33 Pac. 199.)

The so-called decree entered in this case is not a final decree from which an appeal can be taken. It is not a final order discharging the receiver or winding up the affairs of the copartnership. The partnership property has not been judicially ascertained, nor is it identified in any manner by the decree in this case.

The decree does not provide who shall make a division of the property remaining after sale nor in what manner the same shall be divided. It is not final, for the reason that the court has expressly reserved jurisdiction to make any other or further order it deems proper in the premises; and because there is no decree, nor has there been any finding of the court as to the costs of administration, receiver's fees, etc. (*North Carolina R. R. Co. v. Swasey*, 23 Wall. (90 U. S.) 405, 409, 23 L. ed. 136, 137; *Parsons v. Robinson*, 122 U. S. 112, 7 Sup. Ct. 1153, 30 L. ed. 1122; *Lodge v. Twell*, 135 U. S. 232, 10 Sup. Ct. 745, 34 L. ed. 153; *White v. Conway*, 66 Cal. 383, 5 Pac. 672; *Freeman on Judgments*, 4th ed., sec. 34; *Lalande v. McDonald*, 2 Ida. 307, 311, 13 Pac. 347; *Colton Land & Water Co. v. Swartz*, 99 Cal. 278, 33 Pac. 878, 879; *Rochat v. Gee*, 91 Cal. 355, 27 Pac. 670.)

"A judgment, though upon the merits, or determining some substantial right which leaves necessary further judicial action before the rights of the parties are settled, is not final." (*Bateman v. Gitts*, 17 N. M. 619, Ann. Cas. 1915B, 1192, 133 Pac. 969; *State v. Klein*, 140 Mo. 502, 41 S. W. 895; *Standard Steam Laundry v. Dole*, 20 Utah, 469, 58 Pac. 1109.)

Mandamus is the proper proceeding to compel the trial court to enter up a final judgment in order that an appeal may be taken therefrom. (*Havens v. Stewart, Judge*, 7 Ida. 298, 62 Pac. 682.)

Argument for Defendant.

D. E. Brinck, Henry Z. Johnson and Wyman & Wyman, for Defendant.

"The form of the judgment is not material, provided that in substance it shows distinctly and not inferentially that the matter had been determined in favor of one of the litigants, or that the rights of the parties in litigation had been adjudicated." (Black on Judgments, sec. 115.)

The court below would have been without any power to modify the judgment already entered, and substitute another judgment in lieu thereof. (*McCaffrey v. Snapp*, 95 Wash. 202, 163 Pac. 406, 408.)

The writ will not be granted "to reverse the decisions of inferior courts, upon matters properly within their judicial cognizance, or to compel them to retrace their steps, and correct their errors in judgments already rendered." (High's Ex. L. Remedies, 2d ed., p. 167; *Board of Commrs. v. Mayhew*, 5 Ida. 572, 579, 580, 51 Pac. 411, 413, 414.)

Mandamus is ordinarily a remedy for official inaction, and will not lie to undo what has been done. (26 Cyc. 158.)

Mandamus to enter a judgment will not issue where its effect would be to review or control the judicial discretion of the inferior court. (26 Cyc. 210; Spelling on Extraordinary Legal Remedies, sec. 1389; Bailey on Habeas Corpus and Extraordinary Remedies, secs. 208-a, 211; *State ex rel. v. Bradshaw*, 59 Or. 279, 117 Pac. 284; *Lindsey v. Carlton*, 44 Colo. 42, 96 Pac. 997; *Ex parte Morgan*, 114 U. S. 174, 5 Sup. Ct. 825, 29 L. ed. 135; *St. Michael's Monastery v. Steele*, ante, p. 609, 167 Pac. 349; *State ex rel. Harris v. Laflin*, 40 Neb. 441, 58 N. W. 936; *People v. Superior Court*, 114 Cal. 466, 46 Pac. 383.)

The court would have retained jurisdiction to give further instructions to the receiver, whether same had been expressed in his decree or not; and nothing remained to be done except some parts of the administrative phase of the receivership. This does not mean that any provision in the decree is to be changed or modified, but that the court may oversee and

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supervise its enforcement. (*Zappettini v. Buckles*, 167 Cal. 27, 138 Pac. 696.)

The fact that the amount of debts was not determined did not prevent the judgment from being final. (*Costello v. Scott*, 30 Nev. 43, 93 Pac. 1, 94 Pac. 222.)

There is no hard-and-fast rule that upon a dissolution all of the assets of the partnership shall be converted into cash. Under the American rule this is to be done only so far as necessary to pay debts. (30 Cyc. 434, 694; Shumaker, Partnership, 220; *Johnson v. Mantz*, 69 Iowa, 710, 27 N. W. 467.)

"A decree on a partnership dissolution will not be set aside for indefiniteness because it orders defendant to pay the amount which he owes plaintiff and also directs the receiver to wind up the business and pay the judgment, where from its entirety its meaning is clear that if defendant does not pay the amount, then the receiver shall pay it." (*Noble v. Faull*, 26 Colo. 467, 58 Pac. 681.)

Where all the property and assets of a firm are placed in the hands of a receiver in a suit to wind up its affairs, a more specific description is not necessary. (34 Cyc. 314; *Barron v. Mullin*, 21 Minn. 374.)

The only issue between the parties was upon the accounting. The court took the account and found that plaintiff's allegations were true, and gave judgment accordingly.

If the court was mistaken in the manner of enforcing the decree, that could be corrected on appeal. Even were it admitted, the court had erred in the directions given for enforcing the decree, that would not affect the matter of its finality; and being a final decree, an appeal would lie. (*Marquam v. Ross*, 47 Or. 374, 78 Pac. 698, 83 Pac. 852, 86 Pac. 1; *Arnold v. Sinclair*, 11 Mont. 556, 28 Am. St. 489, 29 Pac. 340; *Costello v. Scott*, *supra*.)

The decree is final even where it orders the account to be taken. (Black on Judgments, 41; Bates on Partnership, sec. 970.)

MORGAN, J.—Eugene W. Yeomans and Kirtland I. Perky instituted an action against Charles H. Lamberton,

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plaintiff herein, alleging, in substance, that on April 29, 1910, they, Lamberton and one Hill formed a partnership to deal in real estate, and that later Hill sold his interest therein to Lamberton, whereupon a new partnership agreement was entered into whereby the latter was to receive a commission of 5% upon all sales made by him, the actual expenses of advertising for sale and improving land owned by the partnership, and he was to be allowed a bookkeeper at a salary of \$60 per month and other expenses enumerated in the complaint; that in violation of this contract Lamberton wasted the assets of the partnership, appropriated large sums of its money to his own use, refused to account to his partners for the money received by him, and committed other acts contrary to the terms of the agreement. An accounting, dissolution of the partnership, sale of the assets thereof, payment of debts, a division of the remaining property, and a personal judgment against Lamberton for any sums found due to plaintiffs under the accounting were prayed for. Lamberton filed an answer denying the misappropriation complained of or that he was indebted to the other partners, and prayed for an accounting, dissolution of the partnership and judgment against the plaintiffs in a sum claimed by him to be due.

An order was made by the defendant herein, Hon. Chas. P. McCarthy, as district judge, dissolving the partnership and ordering an accounting. Thereafter a receiver was appointed and the accounting was had, the case tried and the court filed its findings of fact and conclusions of law and a judgment wherein it was decreed, in substance, that Yeomans recover from Lamberton \$10,729.65; that Perky recover from him \$10,066.39, and that execution issue therefor; that the partnership be dissolved, the receiver continue, until final order of the court, to administer the partnership assets and pay the debts and cost of administration; that the interest of Lamberton, in the remaining property, or so much thereof as may be necessary for that purpose, be sold to pay the amounts found due to plaintiffs, and that any remaining property be divided, one-fourth to Yeomans, one-fourth to

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Perky, and one-fourth to Lamberton. By the terms of the decree further directions, as to the administration of the business, may be made by the court during the course of receivership proceedings.

The plaintiff herein has petitioned this court to issue a writ of mandate requiring the defendant to render a final judgment in that action, contending that the decree heretofore made and entered is interlocutory, not final, and therefore not appealable; also that it is void because personal judgment was rendered against him before the partnership assets had been sold and the proceeds distributed among the parties as their interests might appear and an execution was directed to issue thereon; that it is void for ambiguity because it orders that execution shall issue, and yet directs the amounts found due to the plaintiffs to be paid from the sale of the partnership assets in the hands of the receiver; that it specifies that the remainder of the property be divided between the parties, but does not direct who shall make the division; that it does not identify the property to be sold or the debts to be paid; that the court reserves jurisdiction to make further orders controlling the actions of the receiver.

Where a judge refuses to render a final judgment after a case has been finally submitted for adjudication, mandate will lie (*Havens v. Stewart*, 7 Ida. 298, 62 Pac. 682), but it is well settled in this state that such a writ will not issue to compel the court to enter a certain kind of judgment, nor in any case where there is a plain, speedy and adequate remedy at law. (*St. Michael's Monastery v. Steele*, ante, p. 609, 167 Pac. 349, and cases therein cited.)

Is the judgment herein complained of final? Without passing upon the question of whether or not, in an action for a dissolution of partnership and an accounting, the court may render a personal judgment against any of the parties and direct an execution therefor, it is sufficient to say that if such a judgment is erroneous, an appeal therefrom can be taken. The personal feature of the judgment does not render void that part of it which determines the amount due plaintiffs,

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and does not destroy its finality. (*Noble v. Faull*, 26 Colo. 467, 58 Pac. 681.)

Without passing upon the question as to whether the judgment is void, we will say that different remedies are upheld by different authorities to relieve from a void judgment, among which are an appeal, motion to vacate, and appropriate action to prohibit its execution (3 C. J. 467), but our attention has been directed to no authority, and we can find none, holding that the invalidity of such a judgment furnishes a basis for relief by *mandamus*. Indeed, the existence of any one of the various remedies approved by the courts defeats plaintiff's right to the writ prayed for in this case. (*St. Michael's Monastery v. Steele*, *supra*.) Nor can the finality of the judgment be attacked because the court reserved jurisdiction to change or modify the directions given to the receiver. By so doing it does not leave undecided any question involving a substantial right of any of the parties, but, having determined those rights, it directs the mere ministerial execution of such judgment and reserves the power to supervise such execution. (*Zappettini v. Buckles*, 167 Cal. 27, 138 Pac. 696; *Costello v. Scott*, 30 Nev. 43, 93 Pac. 1, 94 Pac. 222.)

In an action for dissolution of a partnership and for an accounting, a determination of the character and identity of the property to be disposed of and of any indebtedness to be paid is necessary, and if the judgment fails to sufficiently describe the property placed in the hands of the receiver to be sold, or the debts to be paid, an appeal will lie to this court as in any other case where the trial court has failed to render findings and to adjudicate a material issue.

The omission to designate who shall divide the remaining property among the parties, and the manner of its division, was not a failure to determine the substantial rights of the litigants, but merely a defect in the mode of execution, and does not affect the finality of the judgment so as to render it nonappealable.

A final judgment has been stated to be one which disposes of the subject matter of the controversy or determines the litigation between the parties on its merits. (3 C. J. 441.)

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The plaintiff in the former action alleged a partnership and violation of the partnership agreement and asked for a dissolution and accounting. It was determined by the court that defendant had not performed the terms of the contract; an accounting was ordered and had, the amount due the plaintiffs was determined, and a receiver was appointed. A decision was given upon every material issue, all the rights of the parties were determined and all that remains to be done is the execution of the judgment. If that which may come before the court for further action is necessary for carrying the judgment or decree into effect, or is merely in execution thereof, it is final and appealable. (3 C. J. 445; *Zappettini v. Buckles*, *supra*; *People v. Bank of Mendocino Co.*, 133 Cal. 107, 65 Pac. 124; *Bryant v. Davis*, 22 Mont. 534, 57 Pac. 143; *Marquam v. Ross*, 47 Or. 374, 78 Pac. 698, 83 Pac. 852, 86 Pac. 1; *Arnold v. Sinclair*, 11 Mont. 556, 28 Am. St. 489, 29 Pac. 340.)

Plaintiff has cited many authorities to sustain his contention that the judgment complained of is not final, for the reason that the court reserved the right to direct the future action of the receiver, but in the authorities cited the acts remaining to be done by the court did not relate to the mere execution of the judgment, but were necessary to the final determination of the substantial rights of the litigants. The authorities are therefore not in point.

The petition for writ of mandate is denied. Costs are awarded to defendant.

Rice, J., concurs.

Budge, C. J., sat at the hearing, but took no part in the decision of this case.

Argument for Appellant.

(October 1, 1917.)

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, Appellant, v. H. E. WILLIAMS, J. L. SILVERS and JULIA A. SILVERS, Respondents.

[168 Pac. 14.]

PUBLIC LANDS—RAILROADS—RIGHT OF WAY—CAREY ACT LANDS.

After a contract has been made between the United States and a state whereby lands are segregated from the public domain pursuant to the Carey Act of Congress, such lands are reserved from sale by the United States and are not public lands within the meaning of the act of Congress of March 3, 1875, granting to railroads rights of way through the public domain, and are not subject to location thereunder.

APPEAL from the District Court of the Fourth Judicial District, for Twin Falls County. Hon. Wm. A. Babcock, Judge.

Action for an injunction. Judgment for defendants. *Affirmed.*

George H. Smith and H. B. Thompson, for Appellant.

The statute, granting to railroads the right of way through the public lands of the United States, should be liberally construed with a view to effectuating the purpose which Congress had in enacting it. (*Winona & St. Paul R. Co. v. Barney*, 113 U. S. 618, 5 Sup. Ct. 606, 28 L. ed. 1109; *United States v. Denver & R. G. R. Co.*, 150 U. S. 1, 14 Sup. Ct. 11, 37 L. ed. 975.)

"A section of the statute should be construed in the light of the purposes for which the legislature enacted the particular act, of which such section is a part." (*Colburn v. Wilson*, 24 Ida. 94, 132 Pac. 579.)

The lands, upon which the railroad company made its location of line and filing, were public lands of the United States, and a right of way vested in the railroad company by virtue

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thereof and the act of Congress of March 3, 1875. (*St. Joseph & Denver City R. R. Co. v. Baldwin*, 103 U. S. 426, 26 L. ed. 578; *Union Pacific Ry. Co. v. Douglas County*, 31 Fed. 540; *Riverside Township v. Newton*, 11 S. D. 120, 75 N. W. 899; *United States v. Blendaur*, 128 Fed. 910, 63 C. C. A. 636; *Minidoka & S. W. R. Co. v. Weymouth*, 19 Ida. 234, 113 Pac. 455; *United States v. Minidoka & S. W. R. Co.*, 190 Fed. 491, 111 C. C. A. 323.)

The circumstance that the filing of the railroad company across the lands in question was approved by the Secretary of the Interior is strongly persuasive of the conclusion that the lands were subject to the act of March 3, 1875. (*Rio Grande Western Ry. Co. v. Stringham*, 38 Utah, 113, 110 Pac. 868; *Oregon Short Line R. Co. v. Stalker*, 14 Ida. 361, 362, 94 Pac. 56; *Rierson v. St. Louis & S. F. Ry. Co.*, 59 Kan. 32, 51 Pac. 901; *Kindred v. Union Pac. R. R. Co.*, 225 U. S. 582, 32 Sup. Ct. 780, 56 L. ed. 1216.)

Sweeley & Sweeley, for Respondents.

The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws. (6 Words & Phrases, 1st ser., 5793, citing cases from a number of courts. (*Bardon v. Northern Pac. Ry. Co.*, 145 U. S. 535, 12 Sup. Ct. 756, 36 L. ed. 806; *Atlantic & Pac. R. Co. v. Fisher*, 1 Land Dec. 392.)

Lands in reservation for any purpose are not public lands within the operative effect of a subsequent grant of Congress, although not in terms excepted from the grant. (*State of Louisiana*, 33 Land Dec. 13; *O'Connor v. Stewart*, 15 Land Dec. 555; *Santa Fe, Prescott & Phoenix Ry. Co.*, 22 Land Dec. 685; *Montana Central R. R. Co.*, 25 Land Dec. 250.)

MORGAN, J.—This action was instituted by appellant to restrain respondents from entering upon and occupying certain portions of a right of way, 200 feet wide, 100 feet on each side of the center of its track, situated in Twin Falls

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county and claimed by it as successor in interest to the Minidoka and Southwestern Railroad Company. Upon a hearing of the cause judgment was rendered in favor of respondents, from which this appeal has been taken.

On February 26, 1904, appellant's predecessor in interest, the railroad company above mentioned, filed its articles of incorporation, maps and plats, and made and filed a definite location of its proposed right of way under the provisions of the act of Congress of March 3, 1875, which were approved by the Secretary of the Interior on August 10, 1904. The railroad was constructed in the spring of 1905, and in 1910 was conveyed to appellant.

On July 1, 1901, the state of Idaho entered into an agreement with the United States wherein it was provided that the state should cause to be irrigated and reclaimed a large tract of land over a part of which the right of way in dispute is located. This agreement was made under the provisions of the act of Congress of August 18, 1894, amended by the act of June 11, 1896, known as the Carey Act, which authorizes the Secretary of the Interior, with the approval of the President, upon proper application of any of the states in which there is situated desert lands, to enter into a contract binding the United States to donate, grant and patent to the state, free of cost for survey or purchase, such desert lands, not exceeding one million acres, as the state may cause to be irrigated, reclaimed and occupied, and not less than twenty acres of each 160 acre tract to be cultivated by actual settlers.

The lands described in the agreement were segregated from the public domain in accordance with the provisions thereof and pursuant to the act of Congress above mentioned. Thereafter an irrigation system was constructed and the lands so segregated were reclaimed and patent issued from the United States to the state on November 20, 1905, and from the state to respondent, Julia A. Silvers, for the land in dispute, in 1908.

Appellant's predecessor in interest had obtained from the settlers a right of way 100 feet in width, being 50 feet on

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each side of the center of its track, and the land in controversy is outside of this 100-foot strip, but within the 200-foot strip claimed under the act of March 3, 1875. This act is to be found in 18 Stats. at L., 482, and the parts material to the determination of this case are as follows:

“Sec. 1. That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road;

“Sec. 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands especially reserved from sale, unless such right of way shall be provided for by treaty-stipulation or by act of Congress heretofore passed.”

It should be noted that the railway company made its definite location or accepted the offer of the United States, after the Carey Act agreement, but prior to the entry by Julia A. Silvers or the issuance of the patent to the state. The question involved is whether, by the Carey Act segregation, the lands therein contained ceased to be public lands and were reserved from sale as contemplated by the act of 1875.

It appears to be well settled that if anyone acquires a vested interest in the public lands of the United States before a railroad company has accepted the offer of the government made by that or similar acts by filing its maps and making its definite location, the lands in which such interest is acquired are no longer public lands within the meaning of the statute, and the railroad company must compensate the party holding such interest in order to acquire a right of way. (32 Cyc. 990.)

By the act of March 3, 1875, a standing offer is made by the government. However, no contract can be deemed to

Points Decided.

have been made with the railroad company, since it failed to accept the offer by performing its prescribed conditions prior to its withdrawal.

The provisions of the Carey Act undoubtedly constitute an offer to the public land states having desert lands and when, in 1901, Idaho entered into the agreement with the United States there was a complete contract, absolutely binding upon the government as long as its conditions were performed by the state. It cannot have been the intention of Congress that the government would violate that contract and, by a later agreement, convey to the railroad company an interest in the lands adverse to that of the state. The contract segregated the lands from the public domain, and they could not thereafter be acquired for right of way purposes under the act of March 3, 1875, because they were no longer public lands of the United States as contemplated by sec. 1, of that act, and because they had been especially reserved from sale by the United States within the meaning of sec. 5 thereof.

The judgment is affirmed. Costs are awarded to respondents.

Budge, C. J., and Rice, J., concur.

(October 1, 1917.)

FRED W. GLENN, Respondent, v. AULTMAN & TAYLOR MACHINERY COMPANY, a Corporation, Defendant; CHARLES H. DOBSON and W. F. FRAMBACH, Appellants.

[167 Pac. 1163.]

NOTICE OF APPEAL—TIME OF SERVICE—ABSENCE OF CERTIFICATE FROM TRANSCRIPT—DISMISSAL.

1. Where the notice of appeal is not filed until after the expiration of the time fixed by statute, this court acquires no jurisdiction of the cause.

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2. Where the transcript or record on appeal from an order denying a motion for a new trial does not contain a certificate of the trial judge, clerk or attorneys that the papers therein contained constitute all of the records, papers and files considered and acted upon by the trial court, upon the hearing of the motion, as required by sec. 4821, Rev. Codes, and Rule 24 of the rules of this court, the appeal must be dismissed.

APPEAL from the District Court of the Fourth Judicial District, for Twin Falls County. Hon. Wm. A. Babcock, Judge.

Action to recover for services rendered. Judgment for plaintiff. *Appeal dismissed.*

Turner K. Hackman, for Appellants.

Sweeley & Sweeley, for Respondent.

BUDGE, C. J.—This action was brought by Fred W. Glenn against Aultman & Taylor Machinery Company, a corporation, Charles H. Dobson and W. F. Frambach. The jury returned a verdict against the defendants Dobson and Frambach, upon which judgment was entered January 31, 1917. Defendants Dobson and Frambach moved for a new trial, which was denied, and an order entered thereon on April 3, 1917. Subsequent to the entry of the judgment it was discovered that the name of Frambach had been omitted therefrom, and upon motion the trial court made an order on June 1, 1917, correcting the judgment theretofore signed and entered by inserting therein the name of Frambach.

On June 1, 1917, Dobson and Frambach appealed: First, from the judgment; and, second, from the order overruling the motion for a new trial, which order was filed June 1, 1917. The appeal was thereafter attempted to be perfected by the filing of the notice of appeal, undertaking and transcript.

The case comes up at this time upon motion to dismiss the appeals. The notice of appeal from the judgment was not filed until approximately thirty days after the time for filing

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same had expired, thereby conferring no jurisdiction upon this court to hear the same.

The order overruling the motion for a new trial cannot be reviewed by this court, for the reason that the transcript contains no certificate of the trial judge, clerk or the attorneys, as required by sec. 4821, Rev. Codes, and Rule 24 of the rules of this court, and there is no way to determine whether the papers contained in the record before us constitute all of the records, papers and files considered and acted upon by the trial court upon the hearing of the motion for a new trial. There is nothing, therefore, for the court to consider, and it follows that the appeal from the order of the court denying a new trial must be dismissed. (*Dudacek v. Vaught*, 28 Ida. 442, 154 Pac. 995; *Walsh v. Niess*, 30 Ida. 325, 164 Pac. 528.)

The appeals are dismissed. Costs awarded to respondent.

(October 2, 1917.)

BOHANNON DREDGING COMPANY, a Corporation, et al.,
Appellants, v. JAMES G. ENGLAND et al., Respondents.

[168 Pac. 12.]

APPEAL AND ERROR—RECORD ON APPEAL—MOTION FOR NEW TRIAL.

1. An appeal from an order overruling motion for a new trial is not subject to dismissal for the reason that notice of motion in the district court was not served upon the adverse parties or their counsel. A motion to dismiss an appeal only presents the question of whether or not the requirements of the statutes and rules as to the mode of taking the appeal have been followed.

2. A deposit of money may be made with the clerk of the district court in lieu of an undertaking on appeal.

3. Service of the clerk's transcript of the record and the reporter's transcript of the testimony, as provided for by secs. 4820-A and 4434, Rev. Codes, is mandatory.

4. The reporter's transcript of the testimony, provided for by sec. 4434, Rev. Codes, is not required to be settled or filed prior to the hearing of a motion for a new trial.

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Argument for Respondents.

5. The statute requiring the filing of a *praecipe* within five days after the filing of notice of appeal is directory and not mandatory. The time of filing the *praecipe* may be considered in connection with the question of diligence in taking the appeal.

6. A transcript on appeal must be filed in this court within the time prescribed by the court rules; otherwise, in the absence of a proper showing excusing the failure to do so, the appeal will be dismissed.

APPEAL from the District Court of the Sixth Judicial District, for Lemhi County. Hon. James G. Gwinn, Presiding Judge.

Action to determine priority of water rights. Motion to dismiss appeal. *Sustained.*

Stevens & Clute, for Appellants, file no brief.

E. W. Whitcomb, A. C. Cherry and J. H. Padgham, for Respondents.

Where the transcript fails to show compliance with the statute and all rules of court in taking an appeal, the same will be dismissed. (Flynn's Dig., p. 30.)

Where the transcript was not settled until after the motion for a new trial had been heard, the same will be stricken from the record on appeal. (*Wood v. Tanner*, 15 Ida. 689, 99 Pac. 123, 1053; *Hattabaugh v. Vollmer*, 5 Ida. 23, 46 Pac. 831.)

"When the transcript on appeal has not been filed with the clerk of this court within the time provided by the rules, and it does not appear that an extension of time has been granted, a motion to dismiss the appeal will be sustained." (*California Consolidated Min. Co. v. Manley*, 12 Ida. 221, 85 Pac. 919; *First Nat. Bank v. Shaw*, 24 Ida. 134, 132 Pac. 802; *Fischer v. Davis*, 24 Ida. 216, 133 Pac. 910.)

The *praecipe* must be filed within five days. (Sess. Laws 1911, p. 375; *Strand v. Crooked River Min. & Mill Co.*, 23 Ida. 577, 131 Pac. 5.)

RICE, J.—This is an appeal from the district court of the sixth judicial district for Lemhi county from an order of the trial court overruling appellant's motion for a new trial. Respondents have moved to dismiss the appeal upon several grounds, each of which will be considered separately.

Respondents first contend that this appeal should be dismissed for the reason that notice of motion for a new trial in the district court was not served upon respondents or their counsel. There is no proof of service of this notice, or acknowledgment thereof, in the record. The order of the trial court overruling the motion, however, recites that the same was heard upon stipulation of counsel as to the time of hearing. This of itself would be a waiver of any objection to the failure to serve the notice; besides, the ruling was in favor of the respondents, and they had not been injured. Moreover, this is not a proper ground for dismissal of the appeal. The objection goes to a matter which transpired in the trial court prior to the entry of the order appealed from, and will not be considered in this court until the appeal is considered upon its merits. In the case of *Vreeland v. Edens*, 35 Mont. 413, 89 Pac. 735, the court said:

“The absence from the record of anything in support of the motion as made in the trial court is no reason why the appeal from the order denying it should be dismissed. The appeal is given by the statute as a matter of right. The fact that the proceedings anterior to the order are irregular or defective to such an extent that the motion is without merit cannot take away this right. It only goes to the merit of the appeal when submitted to this court for determination. A motion to dismiss an appeal only presents the question whether or not the statutory requirements as to the mode of taking the appeal have been observed.” (*Turner v. F. W. Ten Winkel Co.*, 24 Cal. App. 213, 140 Pac. 1086; *Bell v. Staacke*, 137 Cal. 307, 70 Pac. 171.)

The case of *Fox v. Rogers*, 6 Ida. 710, 59 Pac. 538, wherein an appeal from an order denying a motion for new trial was dismissed for the reason that the notice of intention to move

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therefor was not served and filed within ten days after verdict, is overruled on that point.

The second ground assigned for the dismissal of this appeal is that the record has not been properly certified by the trial judge, clerk or attorneys, as to what papers were submitted to the judge or used by him on the hearing of the motion for a new trial. We find in the record, however, a certificate signed by the trial judge designating the papers used and considered by him on the hearing of such motion.

The third reason urged for the dismissal of the appeal is that the record makes no showing that a sufficient undertaking on appeal has been filed with the clerk of the district court. The record contains a certificate of the clerk of the district court to the effect that three hundred dollars in cash had been deposited by the appellant in lieu of an undertaking on appeal, but the date upon which such deposit was made is not given. The certificate of the clerk which was filed with the motion to dismiss, as required by Rule 30 of this court, showed that the deposit was made with him on January 2, 1917, the same day upon which the notice of appeal was filed. Sec. 4809, Rev. Codes, provides for a deposit of cash in lieu of an undertaking on appeal. The third ground for dismissal of the appeal is therefore without merit.

The fourth assignment is to the effect that no complete transcript of the record, as settled by the trial court, has ever been served upon respondents or any of their counsel, and that there is no showing that said transcript on appeal has ever been served. Sec. 4434, Rev. Codes, as amended 1911 Sess. Laws, pp. 379, 380, requires the service of the reporter's transcript of the testimony within five days after the receipt thereof upon the adverse party or his attorney. The adverse party shall have ten days after such service within which to point out, by notice, any errors in said transcript and file same with the clerk of the court. This statute makes no requirement of any other service of the reporter's transcript of the testimony. Sec. 4820-A, Rev. Codes, as amended 1911 Sess. Laws, pp. 375, 376, requires the appellant, or his attorney, upon receipt of two copies of the

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clerk's transcript of the record, to forthwith serve one copy upon the adverse party or his attorney. This transcript is certified by the clerk and not settled by the trial judge. The service provided for by secs. 4820-A and 4434 is mandatory, and failure to make such service as required by the sections of the statute referred to divests this court of jurisdiction to entertain the appeal. (*Strand v. Crooked River Min. & M. Co.*, 23 Ida. 577, 131 Pac. 5; *Coon v. Sommercamp*, 26 Ida. 776, 146 Pac. 728.)

One of the attorneys for the appellant, however, filed his affidavit in this court at the time of filing the motion to dismiss, in which he alleges that he "served copy of the transcript, as settled by the Hon. James G. Gwinn, the trial judge who tried the action in the district court of the sixth judicial district of the state of Idaho, in and for Lemhi county, upon Ariel C. Cherry, one of the attorneys for the defendant herein, on or about the second day of April, 1917." It is impossible to determine from reading this affidavit whether this service has reference only to the reporter's transcript of the testimony or not, or to determine whether the service was made before or after the settlement of such reporter's transcript by the trial judge.

Respondents also ask for the dismissal of the case upon the ground that the reporter's transcript was not settled or filed until after the hearing of the motion for a new trial. This was not necessary. The amended section 4442, found in 1911 Sess. Laws, p. 378, was enacted for the purpose of expediting the hearing of motions for a new trial, and it was provided therein that such hearing might be had upon the minutes of the court, in which event reference might be made to any deposition, documentary evidence or phonographic report of the testimony on file. After the action of the trial judge upon the motion, should an appeal be taken, the appellant may then procure a transcript of the testimony and make up his record as provided by statute in case such record had not been previously prepared. (*Kelley v. Clark*, 21 Ida. 231, 121 Pac. 95.)

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Another reason urged for the dismissal of the appeal is that the supplementary *praecipe* was not filed within five days after filing notice of appeal. The statute requiring the filing of a *praecipe* within five days after the filing of notice of appeal has been held by this court to be directory and not mandatory, and an appeal will not be dismissed for failure to file same within the time directed by statute. (*Strand v. Crooked River Min. & M. Co.*, *supra*.) The time of filing the *praecipe*, however, may be considered in connection with the question of diligence in taking the appeal.

The seventh ground for dismissal of the appeal is as follows: "That the transcript is not engrossed as finally settled by the trial judge; that none of the respondents or any of their attorneys have ever been advised as to any settlement of the transcript on appeal by the trial judge, and have never been served with such transcript on appeal as finally perfected, and are therefore unable to intelligently prepare or present their briefs and arguments on such appeal." It will be noticed that it is not urged that the reporter's transcript of the testimony was not as a matter of fact settled by the judge. We find in the transcript a certificate of the trial judge to the effect that the transcript of the testimony had been duly settled by him. The statute does not require an additional service of the reporter's transcript of the testimony after settlement by the trial judge. Apparently Rule 26 of this court contemplates service of the entire transcript, including both the clerk's transcript of the record and the reporter's transcript of the testimony, after settlement, but under the present condition of the statute and the rules of the court we do not think that an appeal is subject to dismissal on the ground of failure to make service of the transcript if the service required by the statutes quoted has been made.

Finally, it is urged that the appeal must be dismissed because the transcript was not served and filed with this court within sixty days after the appeal was perfected as prescribed by Rule 26 of this court; that there is no showing of any good excuse for such delay, nor any showing of any exten-

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sion of time for the filing of such transcript. The appeal in this case was perfected on January 2, 1917. The appellants obtained two extensions of time from a justice of this court, one for thirty days and the other for fifteen days additional. The time for filing the transcript, as it was thus extended, expired on April 18, 1917. The transcript was filed on May 28, 1917. No showing has been made which would excuse the failure of the appellants to file their transcript within the time prescribed by the rule above mentioned.

For the reason that the transcript on appeal was not filed in this court within the time allowed by the order of the court, and no proper showing has been made excusing the failure so to do, the appeal is dismissed. Costs awarded to respondents.

Budge, C. J., and Morgan, J., concur.

(October 2, 1917.)

FRED W. GLENN, Respondent, v. AULTMAN & TAYLOR MACHINERY COMPANY, a Corporation; CHARLES H. DOBSON, Defendants, and W. F. FRAMBACH, Appellant.

[167 Pac. 1163.]

NOTICE OF APPEAL—SERVICE OF—FAILURE TO NAME ADVERSE PARTY IN NOTICE—ABSENCE OF CERTIFICATE FROM TRANSCRIPT—DISMISSAL.

1. Where one of several codefendants appeals from the judgment or order of the trial court, service of notice of appeal upon such codefendants is essential to the validity of his appeal, since they are adverse parties to the extent that their interests would be affected by the result of such appeal.
2. Where a notice of appeal is addressed to certain parties, naming them, its legal effect is limited to such parties only.
3. An appeal will be dismissed where it appears that the notice of appeal has not been served upon all of the adverse parties whose

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interest might be affected by a reversal or modification of the judgment.

4. Where a transcript on appeal does not contain a certificate from either the trial judge, the clerk or the attorneys that it contains all the records, papers and files used or considered by the trial judge upon the hearing of a motion to correct the judgment, as required by sec. 4821, Rev. Codes, and Rule 24 of the rules of this court, the appeal must be dismissed.

APPEAL from the District Court of the Fourth Judicial District, for Twin Falls County. Hon. Wm. A. Babcock, Judge.

Action to recover for services rendered. Judgment for plaintiff. *Appeal dismissed.*

Turner K. Hackman, for Appellant.

We rely upon the case of *Weeter Lumber Co. v. Fales*, 20 Ida. 255, Ann. Cas. 1913A, 403, 118 Pac. 289, and contend that under that case even were Dobson a resident of this state, he would not need personal notice, and that it is a matter for him to settle as to whom he wants as his attorney.

Counsel for Frambach also represents Dobson, the non-resident, as well as the Aultman & Taylor Machinery Company, the principals, and is ready and willing and has ample authority to bind Dobson, the nonresident, and the Aultman & Taylor Company to abide by any judgment rendered by this court.

Sweeley & Sweeley, for Respondent.

The appeals of Frambach taken from the order of June 1st must be dismissed. The record shows that as to these appeals Dobson is an adverse party, and that in neither appeal was notice served on him. (*Jones v. Quantrell*, 2 Ida. 153, 9 Pac. 418; *Coffin v. Edgington*, 2 Ida. 627, 23 Pac. 80; *Diamond Bank v. Van Meter*, 18 Ida. 243, 21 Ann. Cas. 1273, 108 Pac. 1042, and cases cited in opinion; *Miller v. Wallace*, 26 Ida. 373, 143 Pac. 524; *State Bank v. Watson*, 27 Ida. 211, 148 Pac. 470.)

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Although a party has defaulted, if an appeal affects his rights, he is to be regarded as an adverse party and is entitled to notice. (*Titiman v. Alamance Mining Co.*, 9 Ida. 240, 74 Pac. 529; *Baker v. Drews*, 9 Ida. 276, 74 Pac. 1130.)

BUDGE, C. J.—The facts out of which this appeal arose are the same as those involved in *Glenn v. Aultman & Taylor Machinery Co.*, ante, p. 719, 167 Pac. 1163, and reference may be had thereto for a more detailed statement of the facts.

This is a separate appeal by the defendant Frambach from an order correcting the judgment. From the record it appears that on June 1, 1917, Frambach served and filed a notice of appeal: First, from the judgment; second, from the order overruling the motion for a new trial; and, third, from the order correcting the judgment by inserting therein the name of the defendant Frambach, which latter order was entered June 1, 1917.

The transcript on file does not contain a copy of the notice of appeal, and as there are two separate notices of appeal, filed and served by the defendant Frambach, it is difficult to determine which one is the perfected notice. However, the appeal being fatally defective, we will not pursue this inquiry further.

On July 5, 1917, defendant Frambach filed another or a second notice of appeal, restricting it to the order made June 1, 1917, which was the order made by the trial judge correcting the judgment by inserting therein the name of the defendant Frambach. This is probably the appeal which has been perfected, as upon the same day an undertaking in support of one of the Frambach appeals was duly filed, and a *praecipe* from the defendant Frambach was delivered to the clerk of the court and the transcript thereon prepared.

As far as appears from the record, neither of these notices of appeal was served on Dobson. The attorney for appellant contends that the service of the notice of appeal upon Dobson was unnecessary, for the reason that he is and was the attorney for both Dobson and Frambach in the court below,

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and that he was therefore not required to serve himself with the notice of appeal. An examination of the record properly before us discloses the fact that this appeal is being prosecuted on behalf of Frambach only; it nowhere appearing that Attorney Hackman represented Dobson in the court below in this matter, and we are controlled by the record, wherein it does not appear that Dobson was served with the notice of appeal, although an adverse party, for the reason that if the appellant Frambach should be successful in his appeal, Dobson, his codefendant in the court below, would be obliged to pay the full amount of the judgment of the lower court.

Nor is the appeal directed to Dobson, but it is limited to the attorneys for the respondent and to the clerk of the district court, and signed by W. F. Frambach, by Turner K. Hackman, his attorney. It has been held that where the notice of appeal is directed to one party alone, its service upon another would not have the effect of bringing such other party before the court. (*Hibernia Savings & Loan Soc. v. Lewis*, 111 Cal. 519, 44 Pac. 175, and cases therein cited.) "The principle appears to be that, while an address preceding the body of the notice of appeal is not essential to the validity of the notice, yet, if an address is given, it serves as a limitation thereof, and shows the intention of the appellant to give notice only to those parties to whom it is addressed, and its effect is limited accordingly." (*In re Pendergast's Estate*, 143 Cal. 135, 75 Pac. 962.) The notice being addressed to attorneys for respondent and the clerk of the district court, the former being an adverse party and the latter an unnecessary party (*Westheimer v. Thompson*, 3 Ida. 560, 32 Pac. 205), the notice is limited to the former and does not include Dobson, who is also an adverse party. And the notice of appeal not having been taken on Dobson's behalf, but on Frambach's behalf only, the appeal is subject to dismissal, for the reason that all of the adverse parties were not served.

It has been frequently held by this court that an appeal will be dismissed where it appears that the notice of appeal has not been served upon all of the adverse parties, whose interest might be affected by a reversal or modification

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of the judgment. (*State Bank v. Watson*, 27 Ida. 211, 148 Pac. 470.)

This appeal is subject to dismissal for the additional reason that it is an appeal from a contested motion, and the transcript or record on appeal does not contain a certificate either of the judge, clerk or the attorneys that the transcript contains all of the records, papers and files used or considered by the trial judge upon the hearing of the motion to correct the judgment, as required by sec. 4821, Rev. Codes, and Rule 24 of the rules of this court. (*Dudacek v. Vaught*, 28 Ida. 442, 154 Pac. 995; *Walsh v. Niess*, 30 Ida. 325, 164 Pac. 528.)

The appeal is dismissed. Costs awarded to respondent.

Morgan and Rice, JJ., concur.

(October 2, 1917.)

TIMOTHY DORE, as Special Deputy State Bank Commissioner of the Leadore State Bank, Appellant, v. ERNEST R. BENEDICT, Respondent.

[167 Pac. 1165.]

APPEAL from the District Court of the Sixth Judicial District, for Lemhi County. Hon. James R. Bothwell, Presiding Judge.

Action to recover the par value of certain bank stock alleged to have been held by a stockholder of an insolvent state bank. Judgement for plaintiff. *Affirmed*.

E. W. Whitcomb, for Appellant.

Stevens & Clute and A. C. Cherry, for Respondent.

BUDGE, C. J.—The parties to the above-entitled action and their respective attorneys have stipulated, “that the judge-

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ment to be rendered upon appeal in the above-entitled action shall be governed by the judgment that may be rendered in the case of *Timothy Dore, as Special Deputy State Bank Commissioner of the Leadore State Bank, Plaintiff, v. Morris H. Cottom, Defendant,* ante, p. 696, 167 Pac. 1164. Upon the authority of that case the judgment of the trial court in this cause is affirmed. Costs awarded to respondent.

Morgan and Rice, JJ., concur.

(October 2, 1917.)

MEIER & FRANK COMPANY, a Corporation, Respondent,
v. ROSE MAY BRUCE, Appellant.

[168 Pac. 5.]

CONTRACTS—VALIDITY OF A MARRIED WOMAN'S CONTRACT—CONFLICT OF
LAWS—PUBLIC POLICY—APPEAL AND ERROR.

1. In this state the common-law disability of married women to enter into contracts still remains except when the same has been removed by legislative grants of power.

2. The disability of married women to enter into contracts has not been removed in this state, except where the married woman contracts for her own use or benefit or in reference to the management and control or for the use and benefit of her separate property.

3. The common-law disability of married women to contract in the state of Oregon has been entirely removed. (*First Nat. Bank v. Leonard*, 36 Or. 390, 59 Pac. 873.)

4. A contract entered into by a married woman in the state of Oregon, while there domiciled and to be performed therein, is a valid contract, and must be enforced by the courts of this state.

5. There is nothing wicked or immoral or contrary to public policy in permitting a wife's separate property to become liable for the payment of her husband's debts or community debts; nor is there anything in the statutes to indicate that the public policy of the state would be violated by enforcing a valid contract made by a married woman in a sister state.

[As to law of the place as controlling the validity of a married woman's contract, see note in 46 Am. St. 448.]

Argument for Appellant.

APPEAL from the District Court of the Third Judicial District, for Ada County. Hon. Chas. P. McCarthy, Judge.

Action on contract. Judgment for plaintiff. *Affirmed.*

Oppenheim & Hodgin, for Appellant.

It is nowhere alleged in the complaint that the debt sued upon was incurred for the use and benefit of the separate estate of the appellant. The failure to so allege is fatal; no recovery can be had against a married woman without such an allegation and proof thereof. (*McFarland v. Johnson*, 22 Ida. 694, 127 Pac. 911; *Bank of Commerce v. Baldwin*, 12 Ida. 202, 85 Pac. 497, 14 Ida. 75, 93 Pac. 504, 17 L. R. A., N. S., 676; *Strode v. Müller*, 7 Ida. 16, 59 Pac. 893; *Holt v. Gridley*, 7 Ida. 416, 63 Pac. 188; *Jaechel v. Pease*, 6 Ida. 131, 53 Pac. 399; *Dernham v. Rowley*, 4 Ida. 753, 44 Pac. 643.)

Contracts such as are involved in this suit are governed by the *lex fori*. "The *lex loci contractus* governs as to the legality and construction of the contract, but the *lex fori* will not always enforce a contract because lawful where made. It will not be enforced by the courts of other states where the contract is against public morals or the public interest." (*Spearman v. Ward*, 114 Pa. St. 634, 8 Atl. 430.)

"The public policy of a foreign jurisdiction may prevent the enforcement of a contract which the parties had capacity to make by the law of the place where it was made." (Elliott on Contracts, sec. 1129.)

The leading cases upholding the law of the forum with respect to the disability of married women upon this theory of public policy are: *Armstrong v. Best*, 112 N. C. 59, 34 Am. St. 473, 17 S. E. 14, 22 L. R. A. 188; *Hayden v. Stone*, 13 R. I. 106.

Whether or not a contract is valid by the law of the place where it is made, a creditor is only entitled to the remedies allowed by the forum; and where, according to the laws of the forum, the separate property of a married woman is not subject to attachment, a foreign creditor will not be allowed any different or any greater remedy than a citizen of the

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forum. (*Ruhe v. Buck*, 124 Mo. 178, 46 Am. St. 439, 27 S. W. 412, 25 L. R. A. 178; Minor on Conflict of Laws, p. 9, sec. 5 et seq.)

In all cases affecting the title to real property, either directly or indirectly, the law of the forum is the proper law. (5 R. C. L. 925, 926, 952; *Thurston v. Rosenfield*, 42 Mo. 474, 97 Am. Dec. 353; *Thompson v. Kyle*, 39 Fla. 582, 63 Am. St. 193, 23 So. 12; Bishop on Contracts, p. 573, sec. 1412.)

"The validity and effect of attachment proceedings must be determined by the laws of the state in which they are brought, provided that the property attached is within the jurisdiction of such state." (4 Cyc. 402.)

An attachment is a proceeding *in rem*. (*Potlatch Lumber Co. v. Runkel*, 16 Ida. 192, 18 Ann. Cas. 591, 101 Pac. 396, 23 L. R. A., N. S., 536.)

The rule that, if a certain right is given in one state as to property of a certain nature, comity requires that such right should be enforced in another state as to property of the same nature, is inapplicable to real property. (*La Selle v. Wollery*, 14 Wash. 70, 53 Am. St. 855, 44 Pac. 115, 22 L. R. A. 75; reversing 11 Wash. 337, 39 Pac. 663, 32 L. R. A. 73; *Swank v. Hufnagle*, 111 Ind. 453, 12 N. E. 303.)

"The capacity of a married woman to make contracts affecting her real estate must be determined by the law of the place where the real estate is situated." (*Cochran v. Benton*, 126 Ind. 58, 25 N. E. 870.)

Chas. M. Kahn, for Respondent.

In Oregon, all civil disabilities of a married woman are removed, and she is placed on an equal footing with her husband. (*First Nat. Bank v. Leonard*, 36 Or. 390, 59 Pac. 873.)

"The validity of the contract of a married woman is generally to be determined by the law of the state where it is made." (21 Cyc. 1311; *Armstrong v. Best*, 112 N. C. 59, 34 Am. St. 473, 17 S. E. 14, 25 L. R. A. 188.)

"A contract made in one state which binds the separate estate of a married woman can generally be enforced in another state according to the laws of the former state."

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(21 Cyc. 1434; Wharton, Conflict of Laws, 3d ed., sec. 118; Minor on Conflict of Laws, sec. 72, p. 145; *Bowles v. Field*, 78 Fed. 742, 83 Fed. 886; Story on Conflict of Laws, 7th ed., sec. 103; *Baer Bros. v. Terry*, 108 La. 579, 92 Am. St. 394, 32 So. 353; *Young's Trustee v. Bullen*, 19 Ky. Law Rep. 1561, 43 S. W. 687; *Garrigue v. Kellar*, 164 Ind. 676, 108 Am. St. 324, 74 N. E. 523, 69 L. R. A. 870; *Clark v. Eltinge*, 38 Wash. 376, 107 Am. St. 858, 80 Pac. 556; *Robinson v. Queen*, 87 Tenn. 445, 10 Am. St. 690, 11 S. W. 38, 3 L. R. A. 214; *Thompson v. Taylor*, 66 N. J. L. 253, 88 Am. St. 485, 49 Atl. 544, 54 L. R. A. 585; *Benton v. German-American Nat. Bank*, 45 Neb. 850, 64 N. W. 227; *Baum v. Birchall*, 150 Pa. St. 164, 30 Am. St. 797, 24 Atl. 620; *Mayer v. Roche*, 77 N. J. L. 681, 75 Atl. 235, 26 L. R. A., N. S., 763; *First Nat. Bank v. Mitchell*, 92 Fed. 565, 34 C. C. A. 542; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Young v. Hart*, 101 Va. 480, 44 S. E. 703; *Bell v. Packard*, 69 Me. 105, 31 Am. Rep. 251; *Nichols v. Marshall*, 108 Iowa, 518, 79 N. W. 282.)

A contract is not necessarily contrary to public policy of Idaho merely because it could not validly have been made in this state. In order for one state to refuse to enforce the contracts of another, there must be something inherently bad about those contracts; something pernicious and injurious to the public welfare. (Greenhood on Public Policy, p. 46, Rule 64; *Sutton v. Aiken*, 62 Ga. 741; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *International Harvester Co. v. McAdam*, 142 Wis. 114, 20 Ann. Cas. 614, 124 N. W. 1042, 26 L. R. A., N. S., 774.)

Contracts such as those sued upon are recognized as binding a wife's separate property even when brought in a state where the real property is situated, and where, under the laws of such state, the married woman could not enter into such contracts and bind her separate property. (Wharton, Conflict of Laws, 3d ed., p. 286, sec. 118c.)

RICE, J.—Upon the argument of this case, it was conceded that between the fourth day of March, 1911, and the 10th day of September, 1912, the appellant Rose May Bruce resided at

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Portland, in the state of Oregon, with her husband. During her residence in the state of Oregon respondent complains: First, that it sold and delivered to her and her husband certain family necessities, upon which a balance of \$113.99 was still due and unpaid; second, that on the eighth day of August, 1911, in the state of Oregon, the said appellant with her husband executed a joint and several promissory note in the sum of \$500, upon which a balance of \$474.80 is still due and unpaid; third, that while appellant was in the state of Oregon she and her husband executed a joint and several promissory note in the sum of \$250, which is still due and unpaid. Both of the promissory notes last mentioned were payable at the Bank of Kenton in Portland, Or. On the tenth day of September, 1912, the appellant abandoned her residence in the state of Oregon and took up her residence in Boise, Idaho. On the sixth day of February, 1914, the respondent instituted an action against appellant in the district court for Ada county to recover the sums alleged to be due, and thereupon procured a writ of attachment to be issued against the property of the appellant in Ada county, Idaho. The appellant filed a general demurrer to each cause of action in that court, and also demurred specially upon several grounds, which although specified as error by the appellant were abandoned upon the argument and will not be discussed here. Appellant also filed a motion to quash the levy of attachment, upon the ground that the property levied upon was her sole and separate property and not subject to be levied upon in this action, there being no allegation in the complaint that the indebtedness therein sued upon was incurred for the use and benefit of the defendant's separate estate or for her own use and benefit. The trial court overruled the demurrers to the three causes of action presented to this court, and also the motion to quash the levy of the writ of attachment. The case went to final judgment upon default of an answer, from which judgment this appeal is taken.

It will be conceded that if the contracts alleged in the complaint were executed within and governed by the laws of

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the state of Idaho, they would be void. In the case of *Bank of Commerce v. Baldwin*, 12 Ida. 202, 85 Pac. 497, we find the following:

“It should be borne in mind that all our legislation with reference to contracts, powers and liabilities of married women must be viewed and construed as grants instead of restriction of power and authority to contract.”

In other words, the common-law disability of a married woman to enter into a contract still remains except when the same has been removed by legislative grants of power, and it is held that such disability has not been removed except where the married woman contracts for her own use or benefit or in reference to the management and control or for the use and benefit of her separate property. We quote again from the case of *Bank of Commerce v. Baldwin*, *supra*.

“It follows from what we have already said that in order to bind Mrs. Bowers in this case it will be necessary for the plaintiff to show that the debt was contracted for the use and benefit of her separate property or for her own use and benefit, or in reference to the management, control or business transactions touching such property.”

See the following cases: *Dernham v. Rowley*, 4 Ida. 753, 44 Pac. 643; *Jaechel v. Pease*, 6 Ida. 131, 53 Pac. 399; *Strode v. Miller*, 7 Ida. 16, 59 Pac. 893; *Holt v. Gridley*, 7 Ida. 416, 63 Pac. 188; *McFarland v. Johnson*, 22 Ida. 694, 127 Pac. 911.

With reference to the power of a married woman to contract in the state of Oregon, we quote from the case of *First National Bank v. Leonard*, 36 Or. 390, 59 Pac. 873, as follows:

“We may therefore say with perfect confidence that, with these three sections upon the statute book, the wife can deal not only with her separate property, acquired from whatever source, in the same manner as her husband can with property belonging to him, but that she may make contracts and incur liabilities, and the same may be enforced against her, the same as if she were a *feme sole*. There is now no *residuum* of civil disability resting upon her which is not recognized as existing against the husband.”

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We have, then, a question whether a contract executed in the state of Oregon by a married woman, resident and domiciled in the state of Oregon, and to be performed in the state of Oregon, shall be upheld and enforced in the state of Idaho, although such contract would be invalid if governed by the laws of this state. On this question, under the conditions prevailing in this case, the current of authority is fairly uniform. 9 Cyc. 672, contains the following:

"The validity of the contract, that is, the question of whether the contract is a legal or an illegal one, is judged by the law on the subject in the state or country in which the contract is entered into, the general rule being that a contract good where made is good everywhere, and a contract invalid where made is invalid everywhere."

In Wharton on Conflict of Laws, 3d ed., 272, we find the following:

"Postponing for the present the discussion of the question whether the law of the place where a contract is made, or that of the place where it is to be performed, governs, when the two are opposed, it may be confidently asserted, as a general principle of international law, that, as between the law of the place where a contract is made and that of the place where a married woman is domiciled, her capacity to make a personal contract is governed by the former (*lex loci contractus*), rather than the latter (*lex domicilii*).

In the case at bar, however, the *lex loci contractus* and the *lex domicilii* of appellant coincide. In Minor on Conflict of Laws, at p. 144, we find the following:

"It may be regarded as certain that if the party enters into a contract in the state of his domicile, though the contract is to be performed elsewhere, the proper law governing his capacity to enter into the contract is the *lex domicilii*, no matter where the suit may be brought."

And again, at p. 145, of the same work is the following: "For these reasons, the general principle of private international law is that the capacity of the party to make a contract, whether executory or executed, is governed by the law of the actual (not the legal) situs of the contracting party

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at the time he enters into the contract; or, to put it in different form, by the law of the place where the contract is entered into.

5 R. C. L. 931-934, contains the following: "Accordingly, a contract valid where made is, as a rule, valid everywhere, and a contract invalid where made is invalid everywhere; and its validity or invalidity so determined will generally be recognized wherever it is sought to be enforced, even though the law of the forum would have determined otherwise if applied. If the place where the contract is made is also the place where it is to be performed, there is ordinarily no doubt as to the application of the rule, for then the *lex loci contractus* and the *lex solutionis* are the same. The presumption in the absence of any indication to the contrary will always be that a contract is to be performed at the place where it is made."

In the case of *Mulliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241, Gray, C. J., begins his opinion with the following:

"The general rule is that the validity of a contract is to be determined by the law of the state in which it is made; if it is valid there, it is deemed valid everywhere, and will sustain an action in the courts of a state whose laws do not permit such a contract. (*Scudder v. Union National Bank*, 91 U. S. 406, 23 L. ed. 245.) Even a contract expressly prohibited by the statutes of the state in which the suit is brought, if not in itself immoral, is not necessarily nor usually deemed so invalid that the comity of the state, as administered by its courts, will refuse to entertain an action on such a contract made by one of its own citizens abroad in a state the laws of which permit it. *Greenwood v. Curtis*, 6 Mass. 358 [4 Am. Dec. 145]; *M'Intyre v. Parks*, 3 Met. (Mass.) 207.)"

The case of *International Harvester Co. v. McAdam*, 142 Wis. 114, 20 Ann. Cas. 614, 124 N. W. 1042, 26 L. R. A., N. S., 774, appears to be in point in every particular. In that case it is said:

"A further rule is this: The doctrine that the law of the place of a contract governs as to its interpretation and validity applies to the capacity of the parties, including that of

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married women, to bind themselves in the manner attempted. (Story on Conflict of Laws, secs. 103, 241; *Milliken v. Pratt*, 125 Mass. 374 [28 Am. Rep. 241].)”

From the same case we quote the following: “The last rule that need be stated is this: A contract under the foregoing is not, necessarily, contrary to the public policy of a state, merely because it could not validly have been made there, nor is it one to which comity will not be extended, merely because the making of such contracts in the place of the forum is prohibited, general statements to the contrary notwithstanding. In *Milliken v. Pratt*, *supra*, the court remarked substantially, even a contract expressly prohibited by the statute of the state in which the suit is brought, if not in itself immoral (the term ‘immoral’ being used in the broadest sense), is not, necessarily, nor usually, deemed so invalid that the comity of the state, as administered by its court, will refuse to entertain an action under all circumstances to enforce it. There must be something inherently bad about it, something shocking to one’s sense of what is right as measured by moral standards, in the judgment of the courts, something pernicious and injurious to the public welfare.”

There is nothing wicked or immoral or contrary to public policy in permitting a wife’s separate property to become liable for the payment of her husband’s debts or the community debts. (See *Brodnax v. Etna Ins. Co.*, 128 U. S. 236, 9 Sup. Ct. 61, 32 L. ed. 445; *Sutton v. Aiken*, 62 Ga. 733.) Nor is there anything in the statutes to indicate that the public policy of the state would be violated by enforcing a valid contract made by a married woman in a sister state. It was held in *Bank of Commerce v. Baldwin*, *supra*, that a married woman might mortgage or pledge her separate property to secure her husband’s debts or the community debts. Sec. 2685, Rev. Codes, is as follows: “The separate property of the wife is not liable for the debts of her husband, but is liable for her own debts contracted before or after marriage.”

Sec. 4093, Rev. Codes, provides: “A woman may while married sue and be sued in the same manner as if she were single; provided, that except in actions between husband and wife

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the husband shall not be chargeable in any manner with his wife's costs or other expenses of suit."

Sec. 4477, Rev. Codes, reads in part as follows: "All goods, chattels, moneys and other property, both real and personal, or any interest therein of the judgment debtor not exempt by law, and all property and rights of property, seized and held under attachment in the action, are liable to execution."

We are of the opinion, therefore, that the demurrer to the three causes of action herein mentioned was properly overruled by the trial court.

With reference to the order of the court dismissing appellant's motion to quash the levy of the writ of attachment, the record does not contain any authentication of the papers or files used by the trial court in acting upon the motion. The action of the court, therefore, cannot be considered on this appeal.

The judgment is affirmed. Costs awarded to respondent.

Morgan, J., concurs.

BUDGE, C. J., Dissenting.—I am unable to concur in the opinion of my associates, and, in view of the fact that what I believe to be the settled policy of this state is being departed from, I shall state briefly my reasons for dissenting. I am not unmindful of the fact that the rule announced in the majority opinion has been announced in many jurisdictions and is sustained by respectable authority, but my examination of the cases has convinced me that there is no uniform rule, and I find that in many jurisdictions a different rule has been followed.

Under the common law, for reasons based upon public policy, a married woman could not contract. That policy, to my mind, is still a part of the common law and public policy of this state, except in so far as it has been encroached upon by legislative enactment. Under our statutes and the previous decisions of this court, a married woman's right to contract is limited absolutely to contracts for her own use or benefit, or in reference to the management and control or for

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the use and benefit of her separate property, and that such is the public policy of this state will be readily seen from an examination of the Idaho decisions which have been collected and cited in the majority opinion. Such public policy may exist in the absence of a statute declaring it. We should not lose sight of the fact that the limitations above referred to relate solely to the capacity of a married woman to contract, and have no reference whatever to the status of her property or its liability to be subjected to the payment of any debt which she may lawfully contract. Sec. 2685, Rev. Codes, quoted in the majority opinion does not even purport to enlarge her capacity to contract, but merely renders her separate property liable for any debts which may be lawfully contracted by her, either before or after marriage.

I readily concede that as a general proposition in the conflict of laws and under the comity of states the *lex loci contractus* determines the contract and the *lex fori* determines the remedy, but, as Prof. Minor has clearly pointed out, there are the following well-defined exceptions to the rule: “(1) Where the enforcement of the foreign law would contravene some established and important policy of the state of the forum; (2) where the enforcement of such foreign law would involve injustice and injury to the people of the forum; (3) where such enforcement would contravene the canons of morality established by civilized society; (4) where the foreign law is penal in its nature; and (5) where the question relates to real property.” (Minor on Conflict of Laws, sec. 5, p. 9.)

Referring to the case of *Milliken v. Pratt*, cited in the majority opinion, I desire to quote the following commentary thereon, taken from the note to *Locke v. McPherson*, 85 Am. St. 571, as follows: “Even this case, which seems to be a leading one, and which is cited in most of the later cases in that state and elsewhere, recognizes that where the incapacity of a married woman is ‘the settled policy of the state, for the protection of its own citizens, that it could not be held by the courts of that state to yield to the law of another state in which she might undertake to contract.’ The court sustained

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the action because there was no reason of public policy in Massachusetts which would prevent its maintenance. We believe the better considered cases in general go no further than this—namely, that if the contract is void by the law of the married woman's domicile and opposed to the settled public policy of such state, the courts of the domicile will not enforce it, notwithstanding it was valid where made. The comity of a state does not go to the extent of enforcing rights prohibited by its law."

It would seem that even the Massachusetts court has by later decisions limited the rule announced in *Milliken v. Pratt*. In *Mandell Bros. v. Fogg*, 182 Mass. 582, 94 Am. St. 667, 66 N. E. 198, that court held that, "A statute of the state providing that the property both of the husband and of the wife shall be chargeable with the expenses of the family and the education of the children, and that in relation thereto they may be sued jointly or severally, will not be enforced in another state, though goods were bought on credit in the first named state by the husband when both he and his wife were temporarily therein."

As I view the matter, it is against the settled policy of this state, as derived from the common law, which has been relaxed only in the particular above mentioned, to permit a married woman to enter into any contract except for her own use or benefit or in reference to the management and control or for the use and benefit of her separate property.

I agree with the majority opinion that there would be nothing inherently unjust in holding a married woman's property for her husband's debt, if such were the law, but until all common-law disabilities are removed, creditors of a married woman should occupy the same position, whether foreign or domestic, and it is not incumbent upon this court to extend the doctrine of comity to enlarge rights of a foreign creditor and thereby permit her separate property to be taken in satisfaction of a community debt.

I am unable to see where the enforcement of this contract would contravene any of the canons of morality recognized in this state, but as pointed out by Prof. Minor in the quota-

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tion hereinbefore set forth, "where the enforcement of the foreign law would contravene some established and important policy of the state of the forum," the law of the forum forbids the enforcement of the foreign law. And this exception is just as clearly defined, just as well established, and supported upon as sound reason and eminent authority as the other exceptions to the rule that the *lex loci contractus* should obtain, which have been enumerated by Prof. Minor.

The question is: Can a judgment be recovered against a married woman and her separate property subjected to the payment of the same on a foreign community debt, when it must be conceded that a judgment could not be recovered against her, or her property subjected to the payment of a community debt, incurred in this state, where the action is brought? The remedy in favor of the foreign creditor is granted while the same remedy in favor of a resident creditor is denied. Under the holding in the majority opinion there could be no clearer illustration of the discrimination between the remedy granted to creditors than appears in the instant case. Respondent, a foreign creditor, is the assignee of a local creditor of appellant and her husband, who contracted a community debt while domiciled in this state and prior to their removal to the state of Oregon. The demurrer to the cause of action for this claim was sustained, for the reason that it was a community debt and not a debt incurred by her for her own use and benefit, or in connection with the management and control or for the use and benefit of her separate estate. Therefore, the domestic creditors had no remedy either against her personally or her separate estate. The foreign creditor might waive any claim against her husband and subject her separate estate to the payment of a like debt. Such a holding, in my opinion, is both contrary to the established public policy of this state and not in harmony with the legislative will.

As was said in the case of *Ruhe v. Buck*, 124 Mo. 178, 46 Am. St. 439, 27 S. W. 412, 25 L. R. A. 178: "When this action was brought, this court had, by former decisions, held that a married woman could not be sued by attachment in an

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action at law in Missouri. No such remedy was available in our courts in favor of resident creditors. Had any citizen of Missouri proceeded by attachment at law against this real estate on a contract made or to be performed in this state, no lien would have been created, and no valid judgment could have been rendered against Mrs. Buck. . . . ” So in this state this court has by a long and uniform line of decisions held, not only that a married woman can contract solely with respect to the matters above pointed out, but also that a complaint which fails to allege either that the debt was incurred for her own use and benefit or in connection with the management and control or for the use and benefit of her separate property does not state a cause of action. To my mind this goes, not merely to her capacity to contract, but definitely limits the remedy which pretending creditors may seek to invoke against her.

In view of the fact that the complaint contained no allegation that the contracts sued upon were for her own use or benefit, or in reference to the management and control or for the use and benefit of her separate property, I think the demurrer should have been sustained, for the reasons above given.

Some of the other leading cases so holding are: *First National Bank v. Shaw*, 109 Tenn. 237, 97 Am. St. 840, 70 S. W. 807, 59 L. R. A. 498; *Armstrong v. Best*, 112 N. C. 59, 34 Am. St. 473, 17 S. E. 14, 25 L. R. A. 188; *Brown v. Dalton*, 105 Ky. 669, 88 Am. St. 325, 49 S. W. 443.

In my opinion, the demurrer should have been sustained and the judgment appealed from should be reversed.

Argument for Respondent.

(October 13, 1917.)

MILFORD WILLIAMS, Respondent, v. JOHN SHROPE,
FANNIE SHROPE and BRENNAN & DAVIS, Copart-
ners, Appellants.

[168 Pac. 162.]

MORTGAGE FORECLOSURE—FRAUD—STATUTE OF LIMITATIONS.

1. A cause of action for fraud and misrepresentation is barred in three years from the discovery thereof.

2. A knowledge of such facts as would put a reasonably prudent person upon inquiry is equivalent to a knowledge of the fraud and will start the running of the statute.

APPEAL from the District Court of the Fifth Judicial District, for Bear Lake County. Hon. J. J. Guheen, Judge.

Action for foreclosure of mortgage. Judgment for plaintiff. *Affirmed.*

John A. Bagley, for Appellants, cites no authorities on points decided.

A. B. Gough and D. C. Kunz, for Respondent.

The defense and cross-action is for a rescission of the contract of sale. In such an action it must appear from the allegations that the party seeking to rescind is not guilty of laches. He must have acted promptly and without delay, otherwise a ratification is presumed. (Elliott on Contracts, secs. 2430, 2431; *Breshears v. Callender*, 23 Ida. 349, 131 Pac. 15.)

An action for relief on the ground of fraud must be commenced within three years after the commission of the fraud or the discovery thereof. (Sec. 4054 (4), Rev. Codes.)

An irrigation district is a public corporation, and all of the inhabitants thereof are chargeable with notice. (*Little Willow Irr. Dist. v. Haynes*, 24 Ida. 317, 133 Pac. 905.)

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COWEN, District Judge.—This action was commenced by the respondent, Williams, to foreclose a mortgage given him by the appellants, John Shrope and wife, as security for the payment of a note for the sum of \$1,750, dated July 26, 1910, and due in three years from date. The complaint was filed January 9, 1915. The appellants filed answer to the complaint in foreclosure July 12, 1915, wherein they admit the execution of the note and mortgage, but allege that the same were given as the balance due upon the purchase price of the land described in the mortgage. They allege that the respondent sold the lands in question to them in July, 1910, for the agreed purchase price of \$2,700, they paying the sum of \$1,000 in cash therefor, and giving the note and mortgage for the balance.

The appellants then allege that their purchase of the lands was induced by false and fraudulent representations on the part of the respondent in guaranteeing and representing the lands to be free and clear of liens and encumbrances, when, as a matter of fact, they allege the same were in an irrigation district which then had a bonded indebtedness existing against it of \$98,000, which, they say, was not shown on the abstract of the lands furnished them and of which fact they had no knowledge at the time of the sale. They further state that they discovered the fact in 1913, and thereupon tendered the return of the lands and demanded that the note and mortgage be canceled and their \$1,000 restored to them. They then reallege the foregoing facts by way of cross-complaint and pray for judgment against the respondent for \$1,000 and interest and for such cancelation, and set up a second cross-action for \$350 for improvements made upon the lands; also a third cross-action for the sum of \$26.65. They allege they paid to the irrigation district the sum of \$26.65, which was a "lien and encumbrance on this land by reason of its being in said district, to pay interest on said bonds and pay expenses of the district."

The respondent demurred to the answer and cross-complaint on the ground, among others, that the defense pleaded

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therein was barred by the provisions of subd. 4, sec. 4054, Rev. Codes, relating to the limitation of actions. The demurrer was sustained by the court, and, the defendants declining to plead further, the evidence was submitted and a decree of foreclosure thereupon entered, from which the defendants Shrope appeal to this court and assign as error the action of the court in sustaining the demurrer.

Assuming that the answer and cross-complaint were sufficient in form and substance to support the defense of fraud in the original sale (matters which this court does not directly pass upon because not necessary here), the only question to be passed upon is: Was the defense interposed in time or was it barred by the statute? The action based upon fraud must be commenced within three years from its discovery or it is barred. The appellants allege they discovered the fraud in 1913, but they do not negative a prior discovery in their pleading. There is nothing in their answer or cross-complaint showing that this was the first time the matter was called to their attention. But they do allege that on August 26, 1911, they paid an assessment to the irrigation district to pay interest on bonds and expenses of the district. Here, then, there was knowledge that they were included within the district and were being taxed to pay the district's bonded indebtedness. The fraud, if any existed, was brought home to them on August 26, 1911. They cannot be heard to say, after such fact is brought home to them, that they still did not know of the fraud, because knowledge of such facts as would put them upon inquiry is equivalent to knowledge of the fraud. (29 Cyc. 1114; *Truett v. Onderdonk*, 120 Cal. 581, 53 Pac. 26; *Marks v. Evans*, 6 Cal. Unrep. 505, 62 Pac. 76; *Robertson v. Burrell*, 110 Cal. 568, 42 Pac. 1086; *Lady Washington C. Co. v. Wood*, 113 Cal. 482, 45 Pac. 809.)

We conclude, therefore, from the facts alleged in this answer and cross-complaint that the statute of limitations would commence to run on the cause of defense of the appellants on August 26, 1911, and that such would be barred August 26, 1914, nearly a year prior to the filing of the answer, and that

Argument for Respondents.

the action of the trial court in sustaining the demurrer was proper.

The judgment is affirmed, with costs to respondent as against the appellant John Shrope.

Morgan and Rice, JJ., concur.

(August 29, 1917.)

ISAAC T. COOK, JOHN T. CLARK, LOUIS F. MAHLER, MATILDA GABLE and W. A. ELLIS, Appellants, v. S. C. MILLER, Receiver of the SUNBEAM CONSOLIDATED GOLD MINES COMPANY, a Corporation, Insolvent, Respondent.

[00 Pac. 000.]

NOTICE OF APPEAL—FAILURE TO SERVE ADVERSE PARTIES—DISMISSED.

Where it appears that the notice of appeal has not been served upon all of the adverse parties, the appeal will be dismissed on motion, as such an appeal confers no jurisdiction upon this court under section 4808, Rev. Codes.

APPEAL from the District Court of the Sixth Judicial District, for Custer County. Hon. F. J. Cowen, Judge.

Order confirming receiver's sale. *Appeal dismissed.*

O'Brien & Glennon, for Appellants, file no brief.

Wyman & Wyman, for Respondents Edwards and Custer Slide Mining Co.

Service of notice of appeal upon all adverse parties is jurisdictional, and without such service the appeal must be dismissed. (*Anderson v. Knott*, 1 Ida. 626; *Slocum v. Slocum*, 1 Ida. 589; *Diamond Bank v. Van Meter*, 18 Ida. 243, 21 Ann. Cas. 1273, 108 Pac. 1042; *Bridgham v. National Pole Co.*, 27

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Ida. 214, 147 Pac. 1056; *State Bank v. Watson*, 27 Ida. 211, 148 Pac. 470; *Berlin Mach. Works v. Bradford-Kennedy Co.*, 21 Ida. 669, 123 Pac. 637.)

A purchaser at a judicial sale is an adverse party, and must be served with notice of appeal. (3 C. J. 1014-1016; *Smith v. Noble Bros.* (Okl.), 153 Pac. 1150; *Hibernia Sav. & L. Soc. v. Leuris*, 111 Cal. 519, 44 Pac. 175; *Thompson v. Superior Court*, 119 Cal. 538, 51 Pac. 863; *McDonald v. Citizens' Nat. Bank*, 58 Kan. 461, 49 Pac. 595; *Sanders v. Wade*, 17 Ky. L. 205, 30 S. W. 656.)

BUDGE, C. J.—S. C. Miller was appointed receiver of the Sunbeam Consolidated Gold Mines Company, in an action brought in the district court of the sixth judicial district, in and for Custer county, wherein one H. C. Edwards was plaintiff and the above-mentioned company defendant, and as such receiver sold certain portions of the company's property to the Custer Slide Mining Company, which sale was confirmed by an order of the district court. This appeal is from the order of confirmation and is prosecuted by certain other judgment creditors of the company, all of whom appeared in the trial court and filed their joint and several protests against confirmation of the sale.

Edwards and the Custer Slide Mining Company appeared in this court and moved to dismiss the appeal on the ground that they and certain other adverse parties had not been served with notice of appeal. The attorney for appellants filed an affidavit in which he stated that he had mailed a copy of the notice to Milton A. Brown, the only attorney, as appellant contends, appearing of record, in relation to any of the matters involved in this appeal. The record discloses that Milton A. Brown was the attorney for the receiver.

It is not contended, nor is any showing made, that any of the other parties were served, either the plaintiff, defendant, the purchaser at the receiver's sale, or the other creditors who appeared upon the hearing. In order for this court to have jurisdiction of a cause, it must affirmatively appear that all of the adverse parties whose interest would be affected by

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a reversal or modification of the judgment or order appealed from have been served with the notice of appeal, and if it does not so appear, this court is powerless to go into the merits of the appeal. In the case at bar, so far as appears from the record, no one of the adverse parties has been served with the notice of appeal, and the case must be dismissed. (*Anderson v. Knott*, 1 Ida. 626; *Tootle v. French*, 3 Ida. 1, 25 Pac. 1091; *Adams v. McPherson*, 3 Ida. 718, 34 Pac. 1095; *Doust v. Rocky Mountain Bell Tel. Co.*, 14 Ida. 677, 95 Pac. 209; *Diamond Bank v. Van Meter*, 18 Ida. 243-248, 21 Ann. Cas. 1273, 108 Pac. 1042; *State Bank v. Watson*, 27 Ida. 211, 148 Pac. 470, and cases therein cited; section 4808, Rev. Codes.)

But even if we should regard appellant's affidavit as sufficient showing that the attorney for the receiver was properly served with the notice of appeal, still there being no service thereof on the other adverse parties, this court is without jurisdiction to entertain the appeal. (*Bridgham v. National Pole Co.*, 27 Ida. 214, 147 Pac. 1056; *Berlin Mach. Works v. Bradford-Kennedy Co.*, 21 Ida. 669, 123 Pac. 637; and cases cited *supra*.)

The appeal is dismissed. Costs awarded to H. C. Edwards and the Custer Slide Mining Company.

Morgan and Rice, JJ., concur.

Petition for rehearing denied.

Points Decided.

(September 29, 1917.)

C. G. BURT, W. W. NUSBAUM and F. G. PICKETT, Commissioners of Drainage District No. 1 of Canyon County, Appellants, v. FARMERS' CO-OPERATIVE IRRIGATION COMPANY, LIMITED, and NOBLE DITCH COMPANY, LIMITED, Respondents.

[00 Pac. 000.]

**DRAINAGE DISTRICTS—LEGISLATIVE DISCRETION—LEGISLATIVE POWER—
QUASI CORPORATIONS—CONSTITUTIONAL LAW—SPECIAL ASSESSMENTS
—STATUTORY CONSTRUCTION—POLICE POWERS.**

1. The drainage districts provided for by the laws of this state are *quasi* corporations, being public in their nature and designed to accomplish purposes conducive to the general welfare.

2. The methods of organizing drainage districts, their structure and the means and agencies by which they may accomplish their purpose are matters addressed solely to the legislative discretion, which discretion is not subject to review by the courts except to determine whether such legislation violates some constitutional inhibition.

3. Under the drainage law of 1913, prior to amendment, benefits were to be assessed upon the principles governing special assessments in local improvement districts and were required to bear some relation to the enhanced value of the tracts assessed.

4. The legislature of this state has power to provide that lands which by reason of artificial irrigation contribute by seepage and saturation to the swampy condition of low lands should contribute their just proportion of the cost of constructing works for the reclamation of such lower lands.

5. The common-law rule to the effect that one who diverts water from its natural course did so at his peril and became an insurer against any damage which might result from such action has been modified and relaxed in this state, so that negligence in constructing, maintaining or operating a ditch or canal must be shown as a basis for recovery of damages by persons injured.

6. It is within the legislative power of this state to restore the rule of the common law and render the person diverting water from its natural channel liable for any damages resulting from the escapement thereof.

7. So far as liability for injury caused by water diverted from its natural channel is concerned, no different principle exists between

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water flowing upon the surface of the soil and that seeping or percolating beneath its surface.

8. The legislature having power to provide for the levy of the assessment, the law in question must be upheld, even though in providing for the execution of the power it may have confused the principles upon which the assessment was to be based.

9. A law will be sustained if it can be done without doing violence to constitutional limitations, and at the same time give effect to the evident purpose of the enactment.

10. The law permitting high lands irrigated by artificial means, which are responsible in part for the swampy condition of lower lands, to be assessed for a portion of the cost of constructing the drainage works, is an exercise of that power whereby the legislature provides the means and methods by which one may so use his own property as not to injure that of another.

11. What lands may be included within a drainage district and what lands may not is a question of legislative discretion, and has to do with the structure of the organization which the legislature proposes to create for the accomplishment of the general welfare, and is a question entirely distinct from that of the power of the district after its formation to levy assessments and the constitutional limitations, if any, upon such power.

12. It is not a valid objection to the establishment of a drainage district that a minority in acreage of the lands within its boundaries may receive no special benefit, as that term is used in the drainage district laws of this state.

13. In determining whether a majority of the lands in acreage included in a drainage district will be specially benefited by the construction of the works, the judge may take into consideration the responsibility of the high lands to the low lands for seepage and saturation by irrigation water.

14. It was the intention of the legislature to provide, if, by reason of carrying irrigation water through canals, seepage water escapes from the rights of way thereof and contributes to the waterlogged condition of the land in the proposed drainage district, that these rights of way should be assessed for their just proportion of the cost of constructing the drainage works the same as other high lands.

15. Under the plain language of the drainage district act, the assessments must be made against the tracts of land within the district and not against the person of the owner.

16. That portion of subdivision 5 of sec. 9 of the drainage district act of 1913 relating to assessments upon municipalities or corporations does not apply in the case at bar. The assessments

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therein referred to are not to be made as benefits to any tract of land, but are to be made upon the theory of public benefits for which it is proper that municipalities or corporations should be assessed, to be paid out of the general fund of such municipalities or corporations.

17. The enhanced value of low lands should be taken into consideration in finally determining the proportion of the cost which tracts of land in the district must contribute to the construction of drainage works.

[As to lands which may be included in irrigation district, see note in *Ann. Cas.* 1916A, 1222.]

APPEAL from the District Court of the Seventh Judicial District for Canyon County. Hon. Chas. P. McCarthy, Presiding Judge.

Proceedings upon the reports of commissioners of a drainage district. Judgment in favor of remonstrants. *Reversed.*

Harry S. Kessler, for Appellants.

"The word 'lands' includes the beds of non-navigable lakes and streams, and lands are none the less land for being covered with water." (1 Wash. Real Prop. 3; *Higgins Oil & Fuel Co. v. Snow* (U. S.), 113 Fed. 433, 438, 51 C. C. A. 267; *Montgomery County v. Cochran*, 121 Fed. 17, 21, 57 C. C. A. 261; *Orchard v. Wright-Bell-Dalton-Anchor Store Co.*, 225 Mo. 414, 20 Ann. Cas. 1072, 125 S. W. 486.)

The assessments should be against the corporations personally rather than against the land. The trial court held that these benefits are general benefits and not public, or special, and therefore should have been made against the lands solely and not against the corporations. This conclusion is clearly erroneous. There is a well-defined distinction in the law of taxation by assessment between general benefits and special benefits. (Page & Jones on Taxation by Assessment, 654.)

Personal assessments can be made. (*Storrie v. Cortes*, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666; *Barber Asphalt Paving Co. v. St. Joseph*, 183 Mo. 451, 82 S. W. 64; *Pittsburg, C. C. & St. L. R. Co. v. Fish*, 158 Ind. 525, 63 N. E. 454; *Pitts-*

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burg, C. C. & St. L. Ry. Co. v. Taber, 168 Ind. 419, 11 Ann. Cas. 808, 77 N. E. 741; *Pittsburg, C. C. & St. L. Ry. Co. v. Hays*, 17 Ind. App. 261, 271, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597; *Lovenberg v. Galveston*, 17 Tex. Civ. App. 162, 42 S. W. 1024; *Franklin v. Hancock*, 204 Pa. 110, 53 Atl. 644; *Atchison, T. & S. F. R. Co. v. Peterson*, 5 Kan. App. 103, 48 Pac. 877, affirmed in 58 Kan. 818, 51 Pac. 290; *Elsner, Matter of*, 86 App. Div. 207, 83 N. Y. Supp. 670; *Rochester v. Rochester R. Co.*, 109 App. Div. 638, 96 N. Y. Supp. 152.)

The drainage law was enacted under the police power rather than the power of taxation. (*Elliott v. McCrea*, 23 Ida. 524, 130 Pac. 785.)

The amendment by sec. 9-A inserted an additional basis for levying assessments that is clearly within the police power. (Page & Jones, *Taxation by Assessment*, secs. 419, 420; *Donnelly v. Decker*, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389; *Zigler v. Menges*, 121 Ind. 99, 16 Am. St. 357, 22 N. E. 782; *Charleston v. Werner*, 38 S. C. 488, 37 Am. St. 776, 17 S. E. 33; *Billings Sugar Co. v. Fish*, 40 Mont. 256, 20 Ann. Cas. 264, 106 Pac. 565, 26 L. R. A., N. S., 973; *Chicago, Milwaukee & St. Paul R. Co. v. City of Janesville*, 137 Wis. 7, 118 N. W. 182, 28 L. R. A., N. S., 1124; *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *In re Mingo Drainage Dist.*, 267 Mo. 268, 183 S. W. 611.)

Richards & Haga, McKeen F. Morrow and J. L. Eberle, for Respondents.

The drainage law of 1913 did not include irrigation canals or canal rights of way because they did not require drainage or diking and could not be benefited. (Ida. Sess. Laws 1913, c. 16, p. 58, secs. 1-4, 9, 10.)

The word "benefits" in the law of special assessments for public improvements and in the drainage law of 1913 means enhancement in value by reason of the construction of such improvement. (*Garrett v. City of St. Louis*, 25 Mo. 505, 69 Am. Dec. 478; *Metropolitan etc. Elevated Co. v. Stickney*, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773; Page & Jones, *Taxa-*

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tion by Assessment, sec. 654; *Walker v. Jameson*, 140 Ind. 591, 49 Am. St. 222, 37 N. E. 402, 39 N. E. 869, 28 L. R. A. 680; 2 Cooley on Taxation, 3d ed., p. 1153; *Sears v. Board of Aldermen etc.*, 173 Mass. 71, 53 N. E. 138, 43 L. R. A. 834.)

Sec. 9a added to the drainage law by Laws 1915, chap. 42, is to be construed as merely an addition to the act of 1913, and should be harmonized with the other sections so far as possible, and does not change the definition of the word "lands" or the character of land that can be included in a drainage district. (Lewis' Sutherland Statutory Construction, secs. 368, 380; Idaho Const., art. 3, sec. 18.)

Assessments for local improvements such as those involved here must be levied against the property benefited and cannot be levied against the owners of such property personally. (*Asberry v. Roanoke*, 91 Va. 562, 22 S. E. 360, 42 L. R. A. 636; *Raleigh v. Peace*, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330; *Elliott v. McCrea*, 23 Ida. 524, 130 Pac. 785; *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *Craw v. Tolona*, 96 Ill. 255, 36 Am. Rep. 143; *Creighton v. Manson*, 27 Cal. 613, 628; *Ivanhoe v. Enterprise*, 29 Or. 245, 45 Pac. 771, 35 L. R. A. 58; *Brookings v. Natwick*, 22 S. D. 322, 133 Am. St. 927, 117 N. W. 376, 18 L. R. A., N. S., 1259.)

A legislative declaration that what is not a benefit in fact is a benefit in law is arbitrary, unconstitutional and void. (*Thibault v. McHaney*, 119 Ark. 188, 177 S. W. 877; *Coffman v. St. Francis Drainage District*, 83 Ark. 54, 103 S. W. 179.)

The assessments against respondents were based not on considerations of benefit to them, or their property, but solely upon considerations of benefit to the agricultural lands in the district by reason of the construction of the drainage system, and as such these assessments amount to a denial of due process of law and equal protection of the laws and to a taking of property without compensation. (*Myles Salt Co. v. Board of Commrs.*, 239 U. S. 478, 36 Sup. Ct. 204, 60 L. ed. 392; *Shaw v. Board of Commrs.*, 138 La. 917, 70 So. 910; *Blue v. Wentz*, 54 Ohio St. 247, 43 N. E. 493; *Zinser v. Buena Vista County Supervisors*, 137 Iowa, 660, 114 N. W. 51;

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Mason v. Fulton County Commrs., 80 Ohio St. 151, 131 Am. St. 689, 88 N. E. 401, 24 L. R. A., N. S., 903.)

B. F. Neal, *Amicus Curiae*.

RICE, J.—Drainage District No. 1, Canyon county, was organized by order of the district judge in March, 1915. The commissioners for said district were duly appointed, and in due time their report was filed with the court, in which report it was found that the respondent, Farmers' Co-operative Irrigation Company, was benefited by being relieved from responsibility for damage done to lower lands from seepage and saturation by irrigation water from its canals and the necessity of carrying off waste water to the extent of \$100,000. An assessment was levied against the company in the amount of \$20,000. The other respondent, the Noble Ditch Company, was found to be benefited for the same reason to the extent of \$50,000, and assessed in the amount of \$10,000. The tracts of land of respondents are described in the report. The respondent, Farmers' Co-operative Irrigation Company, has a right of way for its canal within the district, 7.61 miles in length and 100 ft. in width. The respondent, Noble Ditch Company, has within the district a right of way for its ditch, 7.41 miles in length, a portion of which is 100 ft. in width and the remainder 75 ft. in width.

The right of the drainage district to levy assessments against the respondents upon the tracts of lands mentioned above was before this court on a former appeal in the case of *In re Drainage District No. 1*, 29 Ida. 377, 161 Pac. 315. It was there directed that a full hearing be had upon the facts, in order that the law applicable to the case be determined. A hearing was had before Hon. Chas. P. McCarthy, one of the judges of the district court of the third judicial district, sitting for Hon. E. L. Bryan, judge of the seventh judicial district in and for Canyon county. The court filed its findings of fact and conclusions of law and entered judgment in favor of remonstrants and respondents and dismissed the proceedings as against them. The commissioners appealed

to this court, and the appeal is on the judgment-roll alone. Among the findings of fact and conclusions of law to be considered in connection with this appeal are the following:

“FINDINGS OF FACT.

“IV. That the remonstrants herein, Noble Ditch Company, Limited, and Farmers' Co-operative Irrigation Company, Limited, are corporations duly organized and existing under and by virtue of the laws of the state of Idaho, not for profit, but for the purpose of more conveniently and economically maintaining and operating canal systems and distributing water therefrom to the land owners who actually own said canal systems, including the portions thereof lying within the boundaries of said drainage district, and who organized the remonstrants and constructed said canal systems, and have at all times used said systems and the water rights in connection therewith for their sole and mutual benefit and not for sale or rental.

“V. That the agricultural land within the boundaries of said drainage district, being all the land lying within said district, excepting the canals, ditches and rights of way within its boundaries, will, when all irrigated, contribute 16,000 acre-feet of seepage water per year to the wet and water-logged condition of the lands lying within the boundaries of said district.

“VI. That the canal of the remonstrant, Farmers' Co-operative Irrigation Company, Limited, contributes 1,032 acre-feet of seepage water per year to the wet and water-logged condition of the lands lying within the boundaries of said district.

“VII. That the canal of the remonstrant, Noble Ditch Company, Limited, contributes 1,000 acre-feet of seepage water per year, to the wet and water-logged condition of the land lying within the boundaries of said district. . . .

“XI. That neither of said remonstrants received, or will receive, any special benefit or benefits from the proposed drainage, or the construction of the proposed drainage system.

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“XII. That the only benefit that the lands, rights of way or easements of the remonstrants herein receive from the proposed drainage or the construction of the proposed drainage system must be based upon the physical responsibility for contribution of seepage water in the amount set forth in these findings.”

“CONCLUSIONS OF LAW.

“II. That the said acts under which the assessments in question were levied do not contemplate the inclusion of irrigation canals, such as those of the remonstrants herein, and the intention of the legislature in enacting said acts and the express language clearly exclude irrigation canals such as those of the remonstrants herein. . . .

“IV. That the benefit contemplated by section 9a, 1915 Sess. Laws, chap. 42, p. 214, and received by remonstrants in this case, is a general benefit, and not a public or special benefit, and such benefit must be assessed against the land and not against the person.

“V. That if it should be held that canals are included under said section 9a, then the assessment against the remonstrants for seepage water contributed by their canals should be against said canals, and not against the remonstrants personally.

“VI. That physical responsibility for the contribution of seepage water to the wet or water-logged condition of land lying within the boundaries of a drainage district by land owned by a corporation within such district, is not a special or public benefit within the meaning of section 9 of subdivision 5, chap. 16, 1913 Sess. Laws, and is not assessable against such corporation personally.

“VII. That neither remonstrant herein is subject to any liability at law or equity by reason of contribution of any seepage water to the wet or water-logged condition of the land lying within the boundaries of said drainage district, other than any liability which may be imposed upon it by the drainage law.

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“VIII. That in levying assessments against the lands, canals, ditches and rights of way within the boundaries of said drainage district, the board of drainage commissioners of said district, should have taken into consideration not only the relative contribution of seepage water, but also the enhanced value of the land lying within the boundaries of said district.”

The drainage district law under which this action arose is chap. 16, Sess. Laws 1913, p. 58. Section 1 of that act specifies what land shall be included in drainage districts as follows:

“Any portion of a county requiring drainage or diking, or both, may be organized into a drainage district.”

Section 2 sets forth what the petition to form such drainage district shall contain, the principal requirements being as follows:

“1. The object for the organization of the district.

“2. The boundaries thereof.

“3. Approximately the number of acres of land to be benefited by the proposed drainage system.

“4. The names of all freeholders residing within said proposed district so far as known.

“5. The names and postoffice addresses of owners and mortgagees of lands within the proposed district so far as known.

“6. A description of the proposed system of drainage or diking or both, designating the point or points if any there may be which shall be the outlet or outlets for the drainage of said district.

“7. The general route over which the main ditch or ditches are to be constructed.

“8. General location of the dike and levees if any there be.

“9. The further fact that the establishment of the said district and proposed system of drainage will be conducive to the public health, convenience or welfare or increase the public revenue, or that the establishment of the said district and said system of drainage and reclamation will be of special benefit to the majority of the lands in acreage included therein.”

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Section 3 provides for the giving of notice of the proposed hearing upon the organization of the drainage district, and also provides that—

“ Upon final hearing said judge shall make such changes of the proposed boundaries as he may deem to be proper and shall establish and define such boundaries, and shall ascertain and determine the approximate number of acres of land which will be benefited by said proposed drainage system, and shall find whether the said proposed drainage system will be conducive either to the public health, welfare or convenience, or increase the public revenue, or be of special benefit to the majority of the land included within said proposed boundaries of said district as established.”

Section 4 provides that—

“ said judge of the district court of the county in which the proposed drainage district is located, if he finds said proposed drainage system to be conducive either to the public health, welfare or convenience, or will increase the public revenue, or be of special benefit to the majority in acreage of the lands included in said boundaries, shall declare said district duly organized, and to be known as Drainage District No. — of the county of —, in the State of Idaho, and within ten days thereafter shall appoint three drainage commissioners.”

Section 9 provides for the report of the drainage commissioners, and specifies that such commissioners shall determine and report as follows:

“First: Whether the starting point, route and terminus of the proposed work and the proposed location thereof, is or are in all respects proper and feasible and if not, what is or are so.

“Second: The estimated cost of the proposed work, including all incidental expenses and cost of proceedings therefor.

“Third: The probable cost of keeping the same in repair after the work is completed.

“Fourth: What lands will be injured thereby and the aggregate amount of such injuries; and they shall award to

each tract, or lot, by whomsoever held, the amount of damage so determined by them.

“Fifth: What lands will be benefited by the construction of the proposed work, whether the benefits will equal or exceed the aggregate cost of constructing such work, including all incidental expenses, costs of proceedings and damages; and they shall apportion and assess the estimated costs of the same on the lands so benefited by setting opposite the correct description of each tract, lot or easement, the portion of such cost assessed as benefits thereon. And if any particular part of the work so proposed to be done shall be assessed upon any particular tracts or lots of lands or upon any municipality or corporation they shall so specify; and if any municipality or corporation should in their judgment bear a part of the expense or as such will derive a public or special benefit from the whole or any part of such proposed work, they shall so report and assess the amount of such benefits.

“Sixth: Whether the proposed district, as set out in the petition filed, will embrace all the lands that may be damaged or benefited by the proposed work, and if not, what additional lands will be benefited or damaged and the amount of the benefits or damages in the same manner as though such lands were included in such original petition.”

Section 10 provides:

“If the commissioners shall find after the investigation referred to, that the costs, expenses and damages are more than equal to the benefits that will be bestowed upon the lands to be benefited, they shall so report and the proceedings shall be dismissed. But if the commissioners shall report that the whole cost of the work including preliminary surveys and expenses, legal assistance and court costs will be less than the benefits received therefrom, they shall so report to the court; and the court shall then make and enter an order fixing a time and place when and where all persons interested may appear and contest the confirmation thereof.”

The legislature in 1915 passed an act, “amending chap. 16 of the Laws of 1913, . . . by adding a new section thereto to be known as section 9a and by amending sections 7 and 24

thereof." (Sess. Laws 1915, p. 124.) Section 2 of this amendment, which includes section 9a, reads as follows:

"Sec. 9a. In determining the amount which each tract of land will be benefited by such proposed drainage system the commissioners shall consider the damage done to low land from seepage and saturation by irrigation water from high land and the necessity for the carrying off of waste water, and such high lands shall be considered as being benefited to the extent and in the amount that such lands are responsible for damage to low lands from seepage and saturation by irrigation water."

While the power of the legislature to provide for the organization of drainage districts is not directly called in question, some observations relative to this power and the basis on which it rests may be pertinent. In the case of *Elliott v. McCrea*, 23 Ida. 524, 130 Pac. 785, where the drainage district law was first under consideration by this court, it was said that such law was an exercise of the power of the state for the general welfare. In *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. ed. 369, in discussing the power of the state legislature to provide for the formation of irrigation districts, the court said:

"The case does not essentially differ from that of *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. ed. 569, where this court held that the power of the legislature of California to prescribe a system for reclaiming swamp-lands was not inconsistent with any provision of the federal constitution. The power does not rest simply upon the ground that the reclamation must be necessary for the public health. That indeed is one ground for interposition by the state, but not the only one. Statutes authorizing drainage of swamp-lands have frequently been upheld independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property. (*Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 5 Sup. Ct. 441, 28 L. ed. 889; *Wurts v. Hoagland*, 114 U. S. 606, 5 Sup. Ct. 1086, 29 L. ed. 229; *Cooley on Taxn.*, 2d ed., p. 617.) If it be essential or

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material for the prosperity of the community, and if the improvement be one in which all the land owners have to a certain extent a common interest, and the improvement cannot be accomplished without the concurrence of all or nearly all of such owners by reason of the peculiar natural condition of the tract sought to be reclaimed, then such reclamation may be made and the land rendered useful to all and at their joint expense. In such case the absolute right of each individual owner of land must yield to a certain extent or be modified by corresponding rights on the part of other owners for what is declared upon the whole to be for the public benefit."

In the case of *Billings Sugar Co. v. Fish*, 40 Mont. 256, 20 Ann. Cas. 264, 106 Pac. 565, 26 L. R. A., N. S., 973, we find the following:

"Regarding this case as involving an important principle of constitutional law, and one of particular interest to all of the comparatively new states of the Union, we have quoted at length from the decisions of the courts of other states, in order to illustrate the principle seemingly running through all the cases, that the constitutional questions involved should be decided in the light of conditions existing in the particular state. The public policy of the different states has been dictated by and formulated upon such considerations. . . . We know, of course, that Montana contains no vast areas of swamp-lands; and in this regard the physical situation is different from that upon which irrigation laws are designed to operate, but if the state contains any considerable area of marshy lands, to which this law may be applied, we think the principles upon which the two kinds of reclamation laws must rest for their validity are the same. The mere fact that our arid lands are greatly in excess of our marsh lands will not alter the situation so as to necessitate the application of different principles of law to the two cases. We must presume that the legislature in its wisdom has correctly determined that the state contains marsh lands of sufficient area to warrant the conclusion that their reclamation by drainage will redound to the public welfare, irrespective of any consideration of public health."

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Having determined that the public welfare requires the organization of drainage systems, the legislature has provided the means by which they may be organized and the agencies through which they shall perform their functions. The drainage districts provided for are *quasi* corporations, being public in their nature and designed to accomplish purposes conducive to the general welfare. Their method of organization, their structure and the means and agencies by which they may accomplish their purposes, are matters addressed solely to the legislative discretion, which discretion is not subject to review by the courts except to determine whether such legislation violates some constitutional inhibition. (*Reclamation Dist. No. 70 v. Sherman*, 11 Cal. App. 399, 105 Pac. 277.)

The drainage district law of 1913, as it stood before amending, provided for assessments for the costs of the proposed works according to the benefits received by each tract of land assessed, except that if municipalities or corporations, in the judgment of the commissioners, should bear a part of the expense, or as such would derive public or special benefit from the whole or part of such proposed works, they should so report and assess the amount of such benefits. Under the law of 1913 the benefits were to be determined upon the principles governing special assessments in local improvement districts, and were required to be levied with relation to the enhanced value of the tracts assessed. This law was well adapted to the operations of districts where swampy conditions were due to natural causes. (2 Page & Jones, *Taxn. by Assessment*, secs. 651-653; 2 Cooley on *Taxn.*, 3d ed., p. 1153; *Garrett v. St. Louis*, 25 Mo. 505, 69 Am. Dec. 475; *Metro-politan etc. Ry. Co. v. Stickney*, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773; *Sears v. Board of Aldermen, etc.*, 173 Mass. 71, 53 N. E. 138, 43 L. R. A. 834.)

The object sought to be accomplished by the addition of section 9a is not difficult to determine. We quote from the opinion of Mr. Chief Justice Sullivan in the former appeal (29 Ida. 393, 161 Pac. 320), as follows:

"It seems in this irrigated country the question of drainage is now confronting almost every irrigated section, and

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there seem very cogent reasons for a return to the former rule above stated [referring to the common-law rule hereafter stated], at least to the extent of assessing lands for the construction of a drainage system from which seepage or percolation damages or injures other lands. The early settlers of the arid regions were not confronted with the question of drainage, but time and experience have proven that a drainage system is absolutely necessary where large areas of desert land are reclaimed by irrigation."

And again 29 Ida., at p. 395, 161 Pac., at p. 321:

"It is a well-recognized fact that under many of the irrigation systems of our state thousands of acres of land which were reclaimed from an arid condition and which for a time produced valuable crops have now become alkalined or waterlogged, and thus ruined, and grow nothing but willows and tules because of the seepage of waters from canals and the irrigation of higher lands. And it certainly is not the public policy of the state to permit thousands, if not hundreds of thousands of acres of lands that were once productive, to be ruined and made worthless, and leave the owners thereof remediless."

By section 9a the purpose was to require lands on higher levels, on which irrigation water might be brought by artificial means and which contributed to the swampy condition of lower lands by seepage and the percolation of water through the soil, to be assessed in a just amount for the construction of drainage works for the reclamation of such lower land. It is probable that the legislature was not considering the question of legal liability for damages at the suit of private individuals, and certainly it was not considering the question as to whether the seepage and percolation was due to negligence of the person bringing irrigation water upon the higher lands. By section 9a it is provided that such high land shall be considered as being "benefited" to the extent and in the amount such lands are responsible for damages to low lands from seepage and saturation by irrigation water. We have no doubt of the power of the legislature to provide that lands which by reason of artificial irrigation contribute by seepage

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and saturation to the swampy condition of lower lands shall contribute their just proportion of the cost of the construction of drainage works for the reclamation of such lower lands. This court has held that an irrigation district may construct drainage works as a necessary complement of its irrigation system. (*Bissett v. Pioneer Irr. Dist.*, 21 Ida. 98, 120 Pac. 461; *Pioneer Irr. Dist. v. Stone*, 23 Ida. 344, 130 Pac. 382; *Nampa & Meridian Irr. Dist. v. Petrie*, 28 Ida. 227, 153 Pac. 425.)

Under the common law one who diverted water from its natural course did so at his peril, and was held practically to be an insurer against damage which might result from such action. (*Fletcher v. Rylands*, L. R. 1 Exch. 265, affirmed L. R. 3 H. L. 330; 1 Eng. Rul. Cas. 236; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224; *Shipley v. Fifty Associates*, 106 Mass. 194, 8 Am. Rep. 318; *Wilson v. City of New Bedford*, 108 Mass. 261, 11 Am. Rep. 352; *Mairs v. Manhattan Real Estate Assn.*, 89 N. Y. 498.) The common law has been modified and relaxed in this and other arid states, so that the owner of an irrigation ditch is only liable for damages occurring to others as a result of his negligence or unskillfulness in constructing, maintaining or operating the ditch. (*McCarty v. Boise City Canal Co.*, 2 Ida. 225, 245, 10 Pac. 623; *Stuart v. Noble Ditch Co.*, 9 Ida. 765, 76 Pac. 255; *City of Boulder v. Fowler*, 11 Colo. 396, 18 Pac. 337; *Howell v. Big Horn Basin Colonization Co.*, 14 Wyo. 14, 81 Pac. 785, 1 L. R. A., N. S., 596; *Fleming v. Lockwood*, 36 Mont. 384, 122 Am. St. 375, 13 Ann. Cas. 263, 92 Pac. 962, 14 L. R. A., N. S., 628; *Campbell v. Bear River etc. Mining Co.*, 35 Cal. 679; *Messenger v. Gordon*, 15 Colo. App. 429, 62 Pac. 959.) It would be quite within the power of the legislature to restore the rule of the common law and render the owner liable for any damages resulting from the escapement of water which he brings upon his land by artificial means. (*Northpoint C. I. Co. v. Utah S. L. C.*, 16 Utah, 246, 266, 67 Am. St. 607, 52 Pac. 168, 40 L. R. A. 851.) No difference in principle exists in this respect between water flowing upon the surface of the soil and that seeping or percolating beneath its surface.

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(*Mallett v. Taylor*, 78 Or. 208, 152 Pac. 873; *Parker v. Larsen*, 86 Cal. 236, 21 Am. St. 30, 24 Pac. 989.) No reason is apparent why the legislature may not restore the common-law rule in part or for some purposes only, as it undertook to do in section 9a. But it is claimed that this liability cannot be enforced by assessment against the land under the denomination of "benefits"; that assessments for benefits could only be maintained where tracts of land assessed are enhanced in value, and many cases are cited to that effect. Among the authorities so cited are *Garrett v. City of St. Louis*, *supra*; *Metropolitan etc. Ry. Co. v. Stickney*, *supra*; *Walker v. Jameson*, 140 Ind. 591, 49 Am. St. 222, 37 N. E. 402, 39 N. E. 869, 28 L. R. A. 680; *Sears v. Board of Aldermen, etc.*, *supra*. The lawful purpose of such legislative enactment is not to be defeated through any technical construction of the language used. The practical effect of requiring assessments to be made against the tract of land as a benefit, instead of creating a personal liability of the owner thereof, is to relieve the owner of the tract from any personal liability. By a proper exercise of the police power of the state the owner of land might be held personally liable for any damage which results from his action in bringing water upon his land by artificial means. If the legislature chose to provide for such liability only in connection with drainage districts and to limit assessments to the lands only and relieve the owners from personal liability, the owners cannot be heard to complain. Nor must the legislation be held invalid because the legislature in terms provided for the enforcement of a liability as though it were a special benefit to the lands assessed, although the ground for the liability may be found in the police power of the state. (*Donnelly v. Decker*, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389.) The legislature having power to provide for the levy of the assessment, the legislation must be upheld, even though in providing for the execution of the power the legislature may have confused the principles upon which the assessment was to be based, and may have provided in the same act for the levy of assessments on the basis of benefits received and responsibility for injuries inflicted.

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It is suggested that the language of the act does not permit of any such interpretation as we have given it above. Attention is called to section 10 of the 1913 act in which it is provided that if the commissioners find that the cost, expense and damages are more than equal to the benefits to be bestowed on the lands to be benefited, they shall so report and the proceedings shall be dismissed. From this provision it is argued that it necessarily follows that benefits mean enhancement in value of the lands of the district; that this is the only basis upon which benefits to be received can be estimated in money. A drainage district is a public *quasi* corporation. It lies with the legislature to determine when and under what circumstances the public welfare requires the organization of such a district. Even if it be conceded that for the purpose of determining whether a drainage district shall be organized the term "benefits" shall be construed to mean enhancement of value to the lands included within the proposed district, it does not follow that if it is determined that the conditions exist which justify the organization of a drainage district, the same meaning must be applied to the term "benefits" in the method thereafter employed to determine how the cost of the construction of the proposed drainage works shall be levied. It is true the act must be construed as a whole, but it is also true that the act must be construed so as to sustain the law, if it can be done without doing violence to constitutional limitations and at the same time give effect to the evident purpose of the enactment.

It is further suggested that the assessments provided for by the drainage district act are assessments for local improvements, and that to levy assessments on any other basis than that of enhanced value of the tracts assessed is unconstitutional, as being the taking of property without due process of law, or without compensation therefor, and many cases are cited in support of this contention. We cite as illustrative of the principle involved, *Myles Salt Co. v. Board of Commrs.*, 239 U. S. 478, 36 Sup. Ct. 204, 60 L. ed. 392; *Shaw v. Board of Commrs.*, 138 La. 917, 70 So. 910.

We do not consider that this legislation is contrary to the constitutional provisions urged. This is rather the exercise of that power whereby the legislature provides the method and manner by which one may so use his own property as not to injure that of another.

It is clear that the power to levy assessments against tracts of land in a drainage district is limited to the tracts of land included within the boundaries of such district, and the question then arises whether under the statute high lands not benefited by being enhanced in value may properly be included within the drainage district. The statute opens with the declaration that any portion of a county requiring drainage or diking or both may be organized into a drainage district. In section 2 of the act it is required that the petition for the formation of the drainage district must state that the said system of drainage and reclamation will be of special benefit to the majority of the lands in acreage included therein, and in section 3 of the act the district judge upon the hearing of petition is required to find whether the proposed drainage system will be conducive to the public health, welfare and convenience or increase the public revenue, or be of special benefit to a majority of the lands in acreage included within the boundaries of said district as established. In section 9 it is provided that the report of the commissioners must state whether the benefits will equal or exceed the aggregate cost of constructing such work, including all incidental expenses, costs of proceedings and damages, and in section 10 it is provided if the commissioners shall report that the whole cost of the work, including preliminary surveys and expenses, legal assistance and court costs, will be less than the benefits received therefrom, they shall so report to the court, and if the commissioners shall find after the investigation referred to that the costs, expenses and damages are more than equal to the benefits that will be bestowed upon the lands to be benefited, they shall so report and the proceedings shall be dismissed. Section 9a provides that in determining the amount each tract of land will be benefited by such proposed drainage system the commissioners shall consider the damage

done to low land from seepage and saturation by irrigation water from high land, and the necessity for carrying off of waste water, and such high lands shall be considered as being benefited to the extent and in the amount that such lands are responsible for damage to low lands from seepage and saturation by irrigation water.

It must be remembered that all questions relating to the determination of whether a drainage district, which is a public *quasi* corporation, shall be organized or not are questions directed to the legislative discretion. What lands may be included and what lands may not is a question of legislative discretion and has to do with the structure of the organization which the legislature proposes to create for the accomplishment of the general welfare, and is a question entirely distinct from that of the powers of a district after its formation to levy assessments, and the constitutional limitations, if any, upon such powers. It will be noted that the district may be organized if it be found that the proposed drainage system will be of special benefit to the majority of the land in acreage included within its boundaries. It is therefore not a valid objection to the establishment of a district that a minority of the lands in acreage within its boundaries may receive no special benefit as that term is used in sections 1, 2, 3, 9 and 10 of the act. But by the subsequent inclusion of section 9a into the drainage district law it becomes necessary to re-examine all the related provisions of the entire act in view of the substance inserted therein by section 9a. If section 9a is within the power of the legislature to enact, it is not unreasonable to hold that the meaning of the word "benefit," as used in that section, shall give color to the meaning of the term "benefits" as used in all related provisions throughout the act. It is evident that the expression "requiring drainage or diking," in section 1, is not to be construed as a limitation upon the area or character of land to be included within a drainage district, for the judge is not directed to determine whether a majority of the land requires drainage or diking, but to determine whether a majority of the land in acreage will be specially benefited by the drainage system.

As under section 9a lands may be considered as being benefited to the extent and in the amount that such lands are responsible to low lands from seepage and saturation by irrigation water, the judge of the court may take that responsibility for seepage and saturation into account in determining whether a majority of the lands included therein will be specially benefited by the construction of the works.

There can be no constitutional objection to including lands in drainage districts which may not be subject to assessment by the district. As to whether or not lands included shall thereafter be subject to assessment by the district is a question of fact to be determined by the method pointed out by the law itself. The law provides for ample notice to be given and ample means of determining the fact, and therefore the inclusion of land within a district does not in that respect deprive one of his property without due process of law.

Respondents' contention that canals or rights of way for canals are not included in the terms of section 9a is not well taken. Section 9 of the act of 1913 provides that the commissioners "shall apportion and assess the estimated costs of the same on the lands so benefited by setting opposite the correct description of each tract, lot or easement, the portion of such cost assessed as benefits thereon." Section 9a refers to "tracts of land." The rights of way of respondents are easements, but are permanent in their nature and are of such character that their owners have exclusive and continuous possession and control thereof. (See the case of *New Mexico v. United States Trust Co.*, 172 U. S. 171, 19 Sup. Ct. 128, 43 L. ed. 407.) These rights of way are capable of description and may properly be called tracts of land. It was without doubt the intention of the law to provide that if by reason of carrying irrigation water through canals located on the rights of way described seepage water escaped from the rights of way and contributes to the water-logged condition of the land in the proposed drainage district, that these rights of way should be assessed their just proportion of the costs of the construction of the drainage works the same as other high lands. Under the plain language of the statute, how-

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ever, the assessment must be made against the tracts of land included within the district and not against the person of the owner.

We do not think that portion of subdivision 5 of section 9 of the drainage district act of 1913 relating to assessments upon municipalities or corporations applies to such a situation as we have here. The public and special benefits referred to there which must be assessed to municipal or other corporations, we understand has reference to such public benefits as draining of swamps adjacent to a city or village, or schoolhouse, or the drainage of public roads of a county, where the public or a portion thereof is especially benefited, as distinguished from a benefit to a tract of land. These assessments are not to be made as benefits to any tract of land, but are to be made upon the theory of public benefits, specially applicable to a municipality or corporation, for which it is proper that the municipality or corporation should be assessed, such assessment to be paid out of the general funds of such municipality or corporation.

It follows from the foregoing discussion that the rights of way for the canals belonging to the respondents are subject to assessment for their proper portion of the cost of the construction of the drainage works of the district. Apparently, however, the commissioners of the district did not properly use all the elements to be taken into consideration in determining what that proportion should be. The proportion should not be determined alone by the amount of seepage water which causes the wet and water-logged condition of the low lands of the district. The low lands will be enhanced in value and some of such lands may be greatly benefited by drainage even if they had remained in their natural condition. Such enhanced value should be taken into consideration in finally determining the proportion of the cost each tract of land in the district must contribute to the construction of the drainage works.

The judgment is reversed and remanded to the trial court, with directions to modify its findings of fact and conclusions of law and determine the amount of the assessment to be

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levied against the rights of way of the respondents in accordance with the views herein expressed. No costs awarded.

Morgan, J., *concura*.

BUDGE, C. J., Concurring in Part and Dissenting in Part. I concur with my associates to the extent of holding that sec. 9a, chap. 42, Sess. Laws 1915, is a valid and constitutional exercise of the police power by the legislature. To my mind it is well within the constitutional power of the legislature to require high lands or even canals or irrigation systems to contribute to the reclamation of low and water-logged lands to the extent that such high lands and canals and irrigation systems are responsible for damage to such low lands from seepage and saturation by irrigation water, and, as has been so ably indicated in the majority opinion, the constitutionality of such an act is supported by two sound legal propositions: First, as a valid exercise of the police power; second, as a return or partial return, with the necessary appropriate modifications, to the common-law liability, long since departed from in the arid states, under the general power of the legislature to define the public policy of the state as changing conditions, in its wisdom, seem to warrant, and to continue in force, abrogate or return to operation the principles of the common law in whole or in part, whether departed from by judicial fiat or legislative enactment.

I am unable to concur, however, in that portion of the majority opinion which holds that the words "high land" and "high lands" as used in sec. 9a were intended to include canals and irrigation systems. Neither do I think that canals or rights of way for canals are "tracts of land" within the meaning of the act of 1913, or sec. 9a, amendatory thereof in the laws of 1915, but the words "tract of land" refer to tracts of lands as commonly understood. That is to say, if one were speaking of tracts of lands one would not be understood to mean canals or rights of way for canals, no more than one would be understood to mean canals or rights of way for canals, if speaking of "high land," "high lands"

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or "low lands," as such terms are used and understood in their common acceptation. These words can have no possible reference to canals or rights of way for canals. The legislature could, in my judgment, use no language which would have more clearly excluded canals and rights of way for canals, from assessments by a drainage district than that employed in the act. As I understand it, it is conceded that the drainage act of 1913, rendered liable to assessment only such land within a drainage district as required drainage or diking or both, and which was in need of and would be actually benefited, by enhancing its value, by drainage. And a careful study of sec. 9a convinces me that it was the intention of the legislature to subject all high lands irrigated within such drainage district to assessment, irrespective of its enhancement in value, but which contributed by reason of its irrigation to the seepage or water-logged condition of low lands.

The exact wording of sec. 9a is as follows: "Sec. 9a. In determining the amount which each tract of land will be benefited by such proposed drainage system the commissioners shall consider the damage done to low land from seepage and saturation by irrigation water from high land, and the necessity for the carrying off of waste water, and such high lands shall be considered as being benefited to the extent and in the amount that such lands are responsible for damage to low lands from seepage and saturation by irrigation water."

To my mind the words "high land" and "high lands" as they appear in the above section clearly refer to irrigated lands. Had the legislature intended to include canals and irrigation systems in this section the language of the section would have so stated in clear and unmistakable terms. Counsel have by way of analogy called our attention to sec. 1, art. IV, chap. 147, Montana Sess. Laws, 1915. The distinction between this section of the Montana law and sec. 9a of our own law is so marked and tends to illustrate so clearly the point at which my associates and myself diverge that I am constrained to set forth at length the material portion of the Montana section, as follows:

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“Art. IV, Section 1. . . . In apportioning such cost to defray the expenses involved in the construction of the drain, the following principles shall be regarded, and assessments made in accordance therewith:

“All lands which are swampy, bogged or water-logged and will be relieved and improved by virtue of the construction of the drain;

“All lands which are becoming, or are liable to become, swampy, bogged, or water-logged, and which the construction of the drain will prevent from being thus affected;

“All lands included within the watershed of the drain;

“All lands from which surface or seepage waters will enter the drain, or can be conducted into the drain;

“All lands upon which or through which, surface or seepage water will be prevented from flowing, or can be prevented from flowing by virtue of the construction of the drain;

“All lands which will sustain any direct benefit of any kind or character whatsoever, other than that sustained by all other lands in the same vicinity;

“All railways, whether operated by steam, electricity or otherwise, whose right of way or roadbed will be benefited or can be benefited by reason of the construction of the drain;

“All owners of irrigation ditches or canals from which water seeps, drains or wastes to, upon or through lands included within the district served by the drain;”

It will be noticed that the above act specifically includes not only swampy, bogged or water-logged lands or lands which were liable to become so, all lands within the watershed of the drain, all lands from which seepage will enter the drain, all lands where surface or seepage water will be prevented from flowing, lands which will sustain any direct benefit, railway rights of way or roadbeds that will be benefited, which would seem to include every character of land which could be included within the boundaries of a drainage district, but specifically inserted the provision, “all owners of irrigation ditches or canals from which water seeps, drains or wastes to, upon or through lands included within the district served by the drain.” It would have been an easy matter for our own

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legislature to have specified in a like or similar manner irrigation ditches or canals, if such had been the intention, and the fact that this was not done persuades me that the legislature did not intend to include canals or irrigation systems.

I think we should presume that the legislature used the words "high land" and "high lands" as such words are commonly understood and in their ordinary acceptation. Irrigation systems and canals have a commonly accepted significance and no one would ordinarily understand that by the use of the term "high lands" canals or irrigation systems were intended. As I have indicated, I do not doubt the authority of the legislature to include irrigation systems and canals and to make them respond according to the measure of their physical responsibility along with high lands and low lands, if such were the intent, but in so doing some appropriate language should be used which on its face would bear that interpretation. It should be remembered that appellant seeks to assess respondents' irrigation canals, not only in the absence of resulting benefits, but, on the contrary, for the creation of a drainage system, which, in all probability, will result in a positive detriment to the canals, by reason of increased loss from seepage. If such special assessments are to be imposed under the police power, or for the general welfare, or upon the theory that one should so use his own property as not to injure his neighbor, there should be express and positive statutory authority for so doing, and nothing should be left to implication. "Judicial judgment should not be substituted lightly for legislative judgment."

I cannot bring myself to believe that the legislature in using the words "high land" and "high lands" ever intended to include therein or to mean thereby canals or irrigation systems, and I do not feel that what to my mind is the plain and unmistakable meaning of the language used should be extended either by implication or by judicial construction. In order to make sec. 9a mean what the majority opinion has interpreted it to mean, it seems to me that it is necessary by a process of judicial construction to read into the act language similar to that used in the Montana act above quoted, namely,

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"all owners of irrigation ditches or canals from which water seeps, drains or wastes to, upon or through lands included within the district served by the drain." This I am unable to do. Viewing the question in this light, I have felt constrained to record my dissent.

The judgment of the trial court, excluding the canal companies and relieving them from liability to assessment, should be affirmed.

(Petition for rehearing denied.)

(October 2, 1917.)

HARRY KELLY, as Administrator of the Estate of IRA L. DAVIS, Deceased, Respondent, v. THE LEMHI IRRIGATION AND ORCHARD COMPANY, LIMITED, a Corporation, Appellant

[00 Pac. 000.]

INSTRUCTIONS—MASTER AND SERVANT—DEATH BY WRONGFUL ACT—LOSS OF COMPANIONSHIP AS ELEMENT OF DAMAGE—COLLATERAL HEIRS.

1. "All instructions given in a case must be read and considered together and where, taken as a whole, they correctly state the law and are not inconsistent, but may be reasonably and fairly harmonized, it will be assumed that the jury gave due consideration to the whole charge and was not misled by an isolated portion, which, considered alone, does not fully and clearly state the law applicable to the facts in the case." (*State v. Curtis*, 30 Ida. 537, 165 Pac. 999.)

2. A master is liable if an injury to a servant results from his failure to provide the servant with reasonably safe implements and appliances, even though there is also negligence of a fellow-servant, if the two concur as a proximate cause of the injury.

3. In an action brought under sec. 4100, Rev. Codes, if it be shown that the heirs have suffered substantial injury through the loss of the companionship and society of the deceased, then such loss may be considered by the jury in estimating the damages. This is

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true even though the heirs, for whose benefit the action is brought, are not relatives in the direct line but collateral. The close relation and companionship are not implied from the mere fact of relationship, but must be shown by the evidence.

[As to duty of master to furnish servant with safe means and appliances with which to work, see notes in 92 Am. Dec. 213; 21 Am. Rep. 579.]

APPEAL from the District Court of the Sixth Judicial District, for Lemhi County. Hon. J. M. Stevens, Judge.

Action for damages. Judgment for plaintiff. *Reversed conditionally.*

E. W. Whitcomb and Stevens & Clute, for Appellant.

No evidence was given showing that the collateral heirs suffered any damages. Such heirs must prove probable loss or their recovery will be limited to nominal damages. (*Burk v. Arcata & Mad River R. Co.*, 125 Cal. 364, 73 Am. St. 52, 57 Pac. 1065.)

The entire evidence did not show any negligence on the part of the defendant company, and it was shown by the evidence that if the accident was due to anyone's negligence, it was to the negligence of the fellow-workmen of the deceased. (*New Pittsburg Coal etc. Co. v. Peterson*, 136 Ind. 398, 43 Am. St. 327, 35 N. E. 7; *Larsen v. LeDoux*, 11 Ida. 49, 81 Pac. 600; *Smith v. Potlatch Lumber Co.*, 22 Ida. 782, 128 Pac. 546; *Ell v. Northern Pac. R. R. Co.*, 1 N. D. 336, 26 Am. St. 621, 48 N. W. 222, 12 L. R. A. 97; *McKillop v. Superior Shipbuilding Co.*, 143 Wis. 454, 127 N. W. 1053; *Keenan v. New York & Lake Erie Western R. Co.*, 145 N. Y. 190, 45 Am. St. 604, 39 N. E. 711; *McKinnon v. Norcross*, 148 Mass. 533, 20 N. E. 183, 3 L. R. A. 320; *Bagley v. Consolidated Gas Co.*, 5 App. Div. 432, 39 N. Y. Supp. 302; *Kriegel v. Weisel & Vilter Mfg. Co.*, 84 Wis. 148, 53 N. W. 1119.)

Instructions Nos. 4 and 27 were wrong and misleading, for the reason that they in no sense are restrictive as to the amount of damages which the jury were entitled to assess. (*Holt v. Spokane etc. P. R. Co.*, 3 Ida. 703, 711, 35 Pac. 39;

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Burk v. Arcata & Mad River R. R. Co., *supra*; *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 29 Am. St. 143, 30 Pac. 603, 17 L. R. A. 71; *Green v. Southern Pac. Co.*, 122 Cal. 563, 55 Pac. 577; *Hillebrand v. Standard Biscuit Co.*, 139 Cal. 233, 73 Pac. 163; *Ruppel v. United Railroads of San Francisco*, 1 Cal. App. 666, 82 Pac. 1073; *Simoneau v. Pac. Electric Ry. Co.*, 159 Cal. 494, 115 Pac. 320, 2 N. C. C. A. 137; *In re Calif. & Imp. Co.*, 110 Fed. 670; *Christensen v. Floriston Pulp & Paper Co.*, 29 Nev. 552, 92 Pac. 210.)

Where the next of kin are collateral kindred of the deceased, and have not received pecuniary aid from him and are not in a situation to require it, only nominal damages can be recovered. (*Rhoads v. Chicago & Alton R. R. Co.*, 227 Ill. 328, 10 Ann. Cas. 111, 81 N. E. 371, 11 L. R. A., N. S., 623; *Wabash R. Co. v. Cregan*, 23 Ind. App. 1, 54 N. E. 767; *Cleveland, C. C. & St. L. R. Co. v. Drumm*, 32 Ind. App. 547, 70 N. E. 286; *Atchison, T. & Sante Fe R. Co. v. Weber*, 33 Kan. 543, 52 Am. Rep. 543, 6 Pac. 877; *Howard v. Delaware & Hudson Canal Co.*, 40 Fed. 195, 198, 6 L. R. A. 75; *Falkenau v. Rowland*, 70 Ill. App. 20; *City of Chicago v. Scholten*, 75 Ill. 468; *Romeo v. Western Coal & M. Co.*, 157 Ill. App. 67; *Chicago & N. W. Ry. Co. v. Swett*, 45 Ill. 197, 92 Am. Dec. 206; *Munroe v. Pacific Coast Dredging etc. Co.*, 84 Cal. 515, 18 Am. St. 248, 24 Pac. 303; *Pepper v. Southern Pac. Co.*, 105 Cal. 389, 38 Pac. 974; *Golden v. Spokane etc. R. Co.*, 20 Ida. 531, 118 Pac. 1077; *Pool v. Southern Pac. Co.*, 7 Utah, 303, 26 Pac. 654.)

A. C. Cherry and John H. Padgham, for Respondent.

We insist upon the definition of the word "pecuniary" adopted by the supreme court of Idaho, and the supreme court of the United States, and contend that loss of companionship of a brother is, in fact, a pecuniary loss.

Sec. 4100, Rev. Codes, does not limit the damages to pecuniary loss, and does not refer in any way to pecuniary loss or pecuniary damages, but provides that "such damages may be given as under all the circumstances of the case may be just." For the court to interpolate into the statute that damages can

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be given only when the loss of money is alleged and shown by evidence would be judicial legislation. (*Holt v. Spokane etc. R. Co.*, 3 Ida. 703, 35 Pac. 39; *Anderson v. Great Northern R. Co.*, 15 Ida. 513, 99 Pac. 91; *Nehrbas v. Central Pac. R. Co.*, 62 Cal. 320; *Beeson v. Green Mt. G. M. Co.*, 57 Cal. 20; *Illinois Cent. R. Co. v. Barron*, 5 Wall. (72 U. S.) 90, 18 L. ed. 591; *Houghkirk v. President, etc.*, 92 N. Y. 219, 225, 44 Am. Rep. 370; *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553.)

In the following cases it is distinctly held that loss of society is pecuniary loss: *Peters v. Southern Pac. Co.*, 160 Cal. 48, 70, 116 Pac. 400; *Hale v. San Bernardino Valley Traction Co.*, 156 Cal. 713, 716, 106 Pac. 83; *Clark v. Tulare Lake Dredging Co.*, 14 Cal. App. 414, 434, 112 Pac. 564; *Evarts v. Santa Barbara Consol. R. Co.*, 3 Cal. App. 712, 714, 86 Pac. 830; *Mize v. Rocky Mt. Bell Tel. Co.*, 38 Mont. 521, 535, 129 Am. St. 659, 16 Ann. Cas. 1189, 100 Pac. 971.

The reasonable expectation of pecuniary benefit to the next of kin by inheritance, or otherwise, from the continuance in life of the deceased was the proper measure of damages. (*Dickens v. New York C. R. Co.*, 23 N. Y. 158; *Kane v. Mitchell Trans. Co.*, 90 Hun, 65, 35 N. Y. Supp. 581; *Kelly v. Twenty Third St. Ry. Co.*, 14 Daly (N. Y.), 418; *Holmes v. Oregon & C. R. Co.*, 6 Sawy. 275, 5 Fed. 523; *Holland v. Brown*, 13 Sawy. 284, 35 Fed. 43; *Pennsylvania R. Co. v. McCloskey's Admr.*, 23 Pa. 526.)

In order for the negligence of fellow-servants to defeat an action of this kind, it must appear that the death was caused solely by the negligence of fellow-servants. If the negligence of the master commingles with that of a fellow-servant of the deceased, the master is liable. (4 *Thomp. Neg.*, secs. 4856, 4858; *Kennedy v. Grace & Hyde Co.*, 92 Fed. 116.)

A master must indemnify a servant who is injured by the negligence of a fellow-servant, when the delinquency consists in a failure to discharge properly either the function of furnishing the instrumentalities with which the business is carried on or the function of keeping those instrumentalities up to the legal standard of safety while they continue to be used. (*Hough v. Texas & Pac. R. R. Co.*, 100 U. S. 213, 25

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L. ed. 612; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 643, 6 Sup. Ct. 590, 29 L. ed. 755; *Northern Pac. R. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. ed. 994.)

The master owes the duty to his servant to use ordinary care and diligence to provide such sound and sufficient appliances or instrumentalities as are reasonably calculated to insure the safety of the servant in performing the service, to discover and repair any defect therein, and to provide a reasonably safe place in which to perform the service; and if he fail in either of these respects, and injury result to the servant because of such failure, the master will be liable. (4 Thompson on Neg., secs. 3986–3988.)

Collateral heirs may sue and recover substantial damages in a case of this kind. (*Whitley v. Spokane etc. R. Co.*, 23 Ida. 642, 132 Pac. 121; *St. Louis etc. R. Co. v. Moore*, 101 Miss. 768, Ann. Cas. 1914B, 597, 58 So. 471, 39 L. R. A., N. S., 978; *Florida etc. R. Co. v. Foxworth*, 41 Fla. 1, 79 Am. St. 149, 25 So. 338; *Mize v. Rocky Mt. Bell Tel. Co.*, 38 Mont. 521, 129 Am. St. 659, 16 Ann. Cas. 1187, 100 Pac. 971.)

MCCARTHY, District Judge.—This is an action brought by Harry Kelly, as administrator of the estate of Ira L. Davis, deceased, against the Lemhi Irrigation and Orchard Company. It is charged in the complaint that the defendant wrongfully caused the death of the deceased while in its employ by providing the crew, of which he was a member, with a hay derrick which was unsafe and defective in certain particulars expressly set forth; that by reason of such defects said derrick fell and inflicted injuries upon deceased from which he died. The evidence shows that four married sisters and two older brothers are the sole heirs of the deceased. There is no evidence that any of said brothers or sisters were in any way dependent, financially, upon the deceased or had ever received any financial aid from him, nor does the evidence show any likelihood that they would have received any such aid in the future. In fact, the complaint does not contain any allegation that the heirs ever had received or ever expected to receive financial aid. The complaint alleges that the heirs were entitled to the society, companionship, help and advice of their brother

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and that by reason of the negligence of the defendant they have been deprived of his society, companionship, help and advice. The jury found a verdict for \$2,500. Under the evidence the verdict must have been based upon the loss to the heirs of his companionship and society, as there was no evidence of any other loss.

The case is in this court on appeal from an order of the district court denying a motion for a new trial. The principal specifications of error are: The giving of certain instructions by the court; the refusal to give certain instructions requested by appellant; that excessive damages have been given under influence of passion and prejudice, as no evidence appears showing that the collateral heirs, for whose benefit the suit was brought, suffered any damages whatsoever; and that the evidence is insufficient to show actionable negligence on the part of appellant.

Appellant specifies as error instruction numbered 21, as follows: "It is not necessary for the plaintiff to prove all the acts of negligence charged against the defendant in the complaint. If he (the plaintiff) proves any one of the allegations of negligence, and the plaintiff's intestate, Ira L. Davis, deceased, was without fault, it is sufficient."

In speaking of "the acts of negligence," the court clearly refers to the different defects in the hay derrick which are expressly set forth in the complaint. If this instruction stood alone it might be prejudicial, but the prejudicial effect of it is removed when it is read in connection with other instructions which explain just what the plaintiff must show in order to prove actionable negligence on the defendant's part.

"All instructions given in a case must be read and considered together and where, taken as a whole, they correctly state the law and are not inconsistent, but may be reasonably and fairly harmonized, it will be assumed that the jury gave due consideration to the whole charge and was not misled by an isolated portion, which, considered alone, does not fully and clearly state the law applicable to the facts in the

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case.” (*State v. Curtis*, 30 Ida. 537, 165 Pac. 999, and cases there cited.)

Appellant claims there was not sufficient evidence to show negligence on its part and that the evidence shows the fall of the derrick was caused by the negligence of a fellow-servant of the deceased who was operating it. The rule is well established that the master is liable if an injury to a servant results from the master's failure to provide the servant with reasonably safe implements and appliances, even though there is also negligence of a fellow-servant, if the two concur as a proximate cause of the injury. (4 Thompson on Negligence, sec. 4858; *Keast v. Santa Ysabel Gold Min. Co.*, 136 Cal. 256, 68 Pac. 771; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215.)

We conclude that the evidence showing negligence on the part of the master and negligence on the part of the fellow-servant was properly submitted to the jury and that the evidence is sufficient to support the verdict under the rule above stated.

Appellant specifies as error that the damages are excessive, in that the evidence does not show that the collateral heirs suffered any damages, and that the court should have instructed the jury, as requested by appellant, that no damages could be recovered for the loss of the comfort and protection of the deceased. The statute under which the action is brought (sec. 4100, Rev. Codes), is as follows:

“When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just.”

In England and in some of the states the courts have held that under a statute creating liability for wrongfully causing death, recovery is limited to damages for a pecuniary injury, which we understand to mean an injury directly

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causing financial loss. In almost all of the states where this has been held the recovery is limited expressly by statute to pecuniary injury. No such express limitation is made by our statute; therefore these decisions are not in point. In England and in some of the states such is the holding, even though the statute does not expressly limit recovery to pecuniary injury. In California, under a statute like ours, the court holds that recovery is limited to pecuniary injury. (*Beeson v. Green Mt. Gold Min. Co.*, 57 Cal. 20; *Burk v. Arcata & Mad River R. R. Co.*, 125 Cal. 364, 73 Am. St. 52, 57 Pac. 1065.)

In the former case, however, the court holds that, where damages on account of the death of a husband are sought for the benefit of his wife, the loss of companionship or society may be considered as an element of pecuniary damages. This court has held, in case of a parent, recovery may be had for the loss of the society and companionship of a child. (*Anderson v. Great Northern Ry. Co.*, 15 Ida. 513, 99 Pac. 91.) As to whether this is to be considered a pecuniary injury, as said by the California court, this court did not expressly hold. Taking the words as meaning an injury which directly causes a financial loss, we do not see how it can be said that such an injury is a pecuniary injury. It is however, a substantial, serious and material injury and should be compensated in damages, as held by this court and the California court. In case of *Burk v. Arcata etc. R. R. Co.*, *supra*, the California court discriminated in this respect between an heir who is a relation in the direct line and a collateral heir, holding, in effect, that the collateral heir cannot recover for loss of companionship or society, but must show some direct financial loss of a different sort; in other words, must show that he had a reasonable expectancy of deriving financial aid from the deceased, if he had lived, or of inheritance. This decision of the California court was rendered after the legislature of this state passed a statute similar to the California statute, and therefore it cannot be said that the legislature of this state adopted the construction placed upon the statute by the Cali-

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fornia court. We are unable to follow the reasoning of the California decision. If the loss of the society and companionship be a substantial loss which should be compensated, this should apply to any heir, if it can be shown that he has suffered such loss. The statute itself makes no discrimination in this respect. Suppose a brother and sister are left orphans at an early age, with ample means, but with no other near relatives. If the brother be killed after they have grown up together and he has borne toward her the part of father as well as brother, then the loss of his society and companionship is a substantial and material loss to her, almost to the same extent as if he had been her father instead of her brother. In the present case the evidence shows that Mrs. Kelly, a sister of the deceased, had brought him up, really taking the place of his mother. A rule which bars collateral heirs, in all cases, from recovering damages for loss of society and companionship does not strike us as just or sensible, and we find no basis for such a rule in the statute. In the words of the statute, such damages should be allowed as under all the circumstances of the case may be just. Each case must stand on its particular facts. Under the usual conditions of life it is not probable that, in the ordinary case, a collateral heir can show any substantial damages because of loss of society or companionship. However, if in any case a collateral heir can prove there have been such close companionship and relations between himself and the deceased that he has suffered a substantial loss from the termination of that companionship, then the jury may be allowed to consider that fact as an element of damages, in a similar way, although perhaps not generally to the same degree, as it would be considered if the relationship had been in the direct line instead of collateral. Of course no such companionship is implied from the mere relationship, it must be proved to have existed. If such fact be proved, then it may be considered as an element of damages in all cases which come under the statute.

Applying the above rule to the evidence in this case, we conclude there is sufficient evidence of the close relations and

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companionship between the deceased and his sister, Mrs. Kelly, to warrant the jury in considering the loss of that companionship as a ground of substantial damage. We conclude there is not sufficient evidence of close relations and companionship between the deceased and the other heirs to warrant the jury in considering the loss of that companionship as a ground of substantial damage; yet the jury very likely considered the loss of companionship suffered by the other heirs, as well as the loss suffered by Mrs. Kelly, in arriving at the verdict of \$2,500. We conclude that the amount of the judgment should be reduced to \$1,500.

We have examined the other specifications of error relied on by appellant and conclude that they are not well taken.

The cause is remanded with direction to the district court to grant a new trial unless, within thirty days after the filing of the *remittitur*, the respondent shall file in said court his written consent that the judgment be reduced to \$1,500, together with plaintiff's costs incurred in the district court. If such consent is given, the judgment will be modified accordingly, as of the date of its original entry, and, together with the order denying the motion for a new trial, will stand affirmed. Costs upon appeal are awarded to appellant.

Morgan and Rice, JJ., concur.

Petition for rehearing denied.

Argument for Appellants.

(October 26, 1917.)

FARMERS & TRADERS' BANK, a Corporation, and A. H. SWANSON, Respondents, v. NATIONAL LAUNDRY & LINEN SUPPLY COMPANY, a Corporation, HOMER J. RICH, SARAH R. BOOTHE RAWSON, and E. P. HORSEFALL, Appellants.

[168 Pac. 670.]

CORPORATIONS—CAPITAL STOCK—INCREASE OF—NOTICE TO STOCKHOLDERS.

1. Where a corporation seeks to amend its articles of incorporation by increasing or diminishing its stock, a strict compliance with the statutory requirements precedent thereto is necessary.

2. Where a corporation seeking to increase its capital stock fails to pass a resolution by the directors calling a meeting of the stockholders for such purpose, any attempted increase of the stock is ineffective and void.

3. A failure to give notice of a stockholders' meeting called for the purpose of increasing the capital stock of such corporation, as is required by the statute, will render an attempted increase of the stock void.

4. Equity will restrain the corporation and those attempting to act by virtue of an unauthorized increase of the capital stock at the suit of an injured stockholder.

[As to when notice to stockholders to attend special meetings may be omitted, see note in 3 Am. St. 69.]

APPEAL from the District Court of the Fifth Judicial District, for Bannock County. Hon. J. J. Guheen, Judge.

Suit for injunction. Judgment for plaintiffs. *Affirmed.*

W. H. Witty and Standrod & Standrod, for Appellants.

Whether the corporate stock had been properly increased was a question only the state could raise. (*Pullman v. Upton*, 96 U. S. 328, 24 L. ed. 819; *Stutz v. Handley*, 41 Fed. 531.)

If a corporation is authorized by law to increase its capital stock, upon complying with certain prescribed forms or conditions and the corporation or its agents appear to have endeavored to comply with the prescribed forms or conditions,

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and have in fact increased the company's capital stock by issuing new shares, on the assumption that the legal right to increase the capital stock has been acquired, and if the holder of such new shares has acted as a shareholder, and enjoyed the rights of the shareholder, then the creation of such new shares will be recognized by the courts, and given effect according to the intention of the parties, although statutory forms or conditions were not complied with, and no legal right to create the new shares was in fact obtained. (*Morawetz on Private Corporations*, sec. 763.)

Budge & Merrill, for Respondents.

The records of a corporation furnish the evidence of its acts and transactions and parol evidence is not admissible as proof thereof. (*Corcoran v. Sonora Min. & Mill. Co.*, 8 Ida. 651, 71 Pac. 127.)

"Other modes of service may be given the force of such service by legislative enactment, but the use of the words 'personal service,' unqualified, in a statute, means actual service by delivering to the person and not to a proxy." (*Brooks v. Orchard Land Co.*, 21 Ida. 212, 121 Pac. 101.)

"The power to increase the capital stock of a corporation can only be exercised by the stockholders at a meeting called for that purpose." (*Wolf v. Chicago Sign Printing Co.*, 233 Ill. 501, 13 Ann. Cas. 369, 84 N. E. 614; *Matthews v. Columbia Nat. Bank*, 79 Fed. 558.)

Even though the meeting was an annual meeting, the capital stock could not be increased or the number of directors decreased unless sec. 2773 was followed. (*Jones v. Concord etc. R. R.*, 67 N. H. 119, 38 Atl. 120.)

A certificate of increased stock issued before the statutory requirements have been complied with is worthless. (*Lincoln v. New Orleans Exp. Co.*, 45 La. 729, 12 So. 937; *Wood v. Union Gospel Church Bldg. Assn.*, 63 Wis. 9, 22 N. W. 756; *Fishback v. Fon Du Lac etc. R. Co.*, 158 Fed. 88, 88 C. C. A. 367.)

COWEN, District Judge.—On July 14, 1915, the National Laundry & Linen Supply Company was an Idaho corpora-

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tion doing business at Pocatello, Idaho, having a capital stock of \$10,000, divided into 100 shares of \$100 each, of which stock the appellant Homer J. Rich was the owner of 35 shares, the appellant Sarah R. Boothe Rawson was the owner of 12½ shares, the appellant E. P. Horsefall was the owner of 5 shares, and the respondent A. H. Swanson was the owner of 4 shares. It does not appear from the record whether the other shares were issued or not.

On or about April 1, 1915, the appellants Rich and Rawson borrowed from the Farmers & Traders' Bank of Pocatello the sum of \$3,000, giving their joint and several note therefor, payable in six months from date, and pledged their 47½ shares of the capital stock of the corporation as collateral security for the payment of the note, and about the same time they gave other notes to the same bank for sums aggregating over \$2,000. On July 14, 1915, the appellants held what is claimed to be the annual meeting of the stockholders of the National Laundry & Linen Supply Company, and passed a resolution to increase the capital stock of the corporation from \$10,000 to \$25,000, and decreased the directors from five to three, and thereafter on November 24, 1915, filed a certificate of such increase with the recorder of Bannock county, which certificate was also filed about the same time with the Secretary of State at Boise, Idaho.

It is claimed by the respondents, and does not seem to be disputed in any manner by the record, that no meeting was ever called by the board of directors of the corporation for the purpose of voting upon the question of increasing the capital stock of the corporation. It is also claimed by the respondents that no notice was ever given of the meeting at which such question would be voted upon as is required by the statute, but the appellants claim that notice was given.

At the meeting on July 14th, at which such increase of the capital stock is alleged to have been determined upon, the company was authorized to issue 38 shares of the new capitalization to Homer J. Rich in consideration of the transfer to the company of certain real estate upon which the laundry was situated, and it was also authorized to issue 65 shares of

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the increased capitalization to Sarah R. Boothe Rawson in payment of certain debts and obligations then claimed to be owing from the corporation to her, and the certificates of stock therefor were issued to these appellants in October, prior to the filing of the certificate with the recorder and Secretary of State and before any certificate from the Secretary of State had been issued to the company authorizing it to do business upon a \$25,000 capitalization. In October also the bank foreclosed its lien upon the 47½ shares of the original capital stock pledged as security, and at a sale of such stock became the purchaser thereof, and also about the same time became the purchaser of three of the four shares held by the respondent A. H. Swanson, thus becoming the owner of 50½ shares of the original capitalization. The bank later demanded of the corporation a transfer on the books of the company of the shares of stock held by it, and upon such demand appellants offered to transfer the same by issuing to the bank an equivalent number of shares of the increased capitalization, which the bank refused to accept and thereupon commenced this action with its complaint A. H. Swanson to have the attempted increase of the capital stock of the said corporation declared to be void, and to have the shares of stock under the increased capitalization issued to the appellants Rich and Rawson canceled; to compel the corporation to transfer its 50½ shares of the original stock upon the books of the corporation, and enjoin the defendants Rich and Rawson from exercising any right, authority or control in the affairs of the said corporation by virtue of the shares of such increased capital stock so issued to them.

Trial was had in the district court, which found in favor of the plaintiffs and judgment was entered in accordance with the prayer of the complaint. The defendants appeal to this court.

It is contended on behalf of the appellants that a court of equity does not have jurisdiction of an action of this character, and that the action of the stockholders may not be attacked in a collateral proceeding of this kind, but is subject only to an attack on behalf of the state. But the authorities

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seem to hold differently upon this question, as will appear from sec. 3639 of Thompson on Corporations, where ample authority is cited.

The appellants assign ten specifications of error on the part of the trial court, but all these specifications depend upon the one question as to the legality or illegality of the action taken at the stockholders' meeting on July 14, 1915, increasing the capital stock from \$10,000 to \$25,000. If the action increasing the capital stock was legal, then the judgment of the court below was erroneous; but if the attempted increase was illegal, then the judgment should not be disturbed.

At the trial in the district court there was produced and offered in evidence the minute-book of the proceedings of the corporation, and this fails to show that any action of the board of directors was ever taken for the purpose of authorizing a vote for the increase of the capital stock. Attached to one page of the minutes of the proceedings of the meeting of July 14th appears a copy of a notice of the annual stockholders' meeting of the corporation, which stated that the meeting would be held for the purpose of increasing the capital stock from \$10,000 to \$25,000, and of decreasing the number of directors from five to three. This notice is signed by Homer J. Rich, President, and is dated June 12, 1915. It is admitted that this notice was never published. Plaintiff Swanson testified that he never received a copy of the notice. It was stipulated on the trial that P. H. Keller, a witness for the defendant, would, if present at the trial, testify that he was employed by the defendant corporation in the capacity of bookkeeper, and at the request of Homer J. Rich mailed a copy of the said notice to the plaintiff A. H. Swanson.

Sec. 2773, Rev. Codes, provides the method by which a corporation may increase or diminish its capital stock, and the first prerequisite therefor is that a majority vote of the directors may call a meeting of the stockholders, to be convened for the purpose of increasing or diminishing the capital stock, and the second prerequisite is that personal notice of the time and place of such meeting, and the object thereof, must be served on each stockholder at least thirty days prior

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to the date of such proposed meeting, or in lieu thereof, the notice must be published at least once a week in a newspaper published in the county where the principal business is located, for at least thirty days. These two requirements of the statute were not complied with by the appellants when they attempted to increase the capital stock of the corporation. A strict compliance was necessary. (Thompson on Corporations, secs. 3631, 3632.) Until the statutory requirements have been fulfilled, increased stock has no existence. (Thompson on Corporations, sec. 3631; *Lincoln v. New Orleans Exp. Co.*, 45 La. 729, 12 So. 937.) Subscribers to such increased stock are not liable for their subscriptions. (Thompson on Corporations, sec. 3638.) And equity will enjoin an illegal increase of stock in an action by stockholders. (Thompson on Corporations, sec. 3639.)

We are therefore constrained to hold that the attempt to increase was nugatory and void so far as respondents are concerned, where no principle of estoppel would enter to prevent their contesting such attempted increase. There is no estoppel pleaded in the answer of the appellants, nor is there anything in the contention of the appellants, as we see it, that would preclude respondents' right to question the proceedings of the stockholders at their meeting on July 14, 1915.

The action of the district court should therefore be affirmed, and it is so ordered. Costs awarded to respondents.

Morgan and Rice, JJ., concur.

Points Decided.

(October 26, 1917.)

Z. T. CLAY and HERMAN ERICKSON, Appellants, v.
BOARD OF COUNTY COMMISSIONERS OF MADISON COUNTY, Respondents.

[168 Pac. 667.]

SCHOOL DISTRICTS—CONSOLIDATED SCHOOL DISTRICTS—EVIDENCE—BOARD OF COUNTY COMMISSIONERS—POWERS OF—COUNTY SUPERINTENDENT OF PUBLIC INSTRUCTION—ESTOPPEL.

1. On an appeal to the district court from an order made by the board of county commissioners, extrinsic evidence is admissible to determine upon which petition the county commissioners acted.

2. Where a board of county commissioners has consolidated two adjacent school districts, a succeeding board may, upon proper proceedings, divide the same.

3. A district formed by the union of two or more existing districts does not occupy any different position after consolidation and is not invested with any different or additional powers than a district created from unorganized territory.

4. Where a school district has been organized by an order of the board of county commissioners, a future board has express statutory power to change the boundaries or divide the district upon a proper petition therefor being presented.

5. The recommendation of the superintendent of public instruction in writing is not necessary to give the board of county commissioners jurisdiction to divide a school district.

6. An appeal to the district court from an order made by the board of county commissioners must be predicated upon the existence of such an order, and, upon the trial in the district court, the appellant cannot be heard to say that the order appealed from did not represent any action of the board.

[As to meaning of "adjacent" in statute relating to annexation to school district, see note in *Ann. Cas.* 1913B, 171.]

APPEAL from the District Court of the Ninth Judicial District, for Madison County. Hon. James G. Gwinn, Judge.

Appeal from an order of the board of county commissioners creating a new school district. Judgment for defendants. *Affirmed.*

Argument for Respondents.

C. W. Poole, for Appellants.

If it be held that the provisions of the statute embrace within their terms this class of districts, they being formed only upon the petition of the majority of heads of families, jurisdiction to dismember, segregate or disorganize them could be conferred only by petition of two-thirds of the heads of families, as provided in the law. (*Wood v. Independent School Dist.*, 21 Ida. 734, 124 Pac. 780.)

If the order had been made by the board while sitting in session, it would be effective without the chairman's signature, but not having been made by the board, and being only an act of the clerk, though all of the members gave their separate or individual sanction to it, it would still be invalid, as not being the act of the board. (*Rankin v. Jauman*, 4 Ida. 394, 39 Pac. 1111; *Müller v. Smith*, 7 Ida. 204, 61 Pac. 824; *Conger v. Latah County Commrs.*, 4 Ida. 740, 48 Pac. 1064; 11 Cyc. 391, 392; *Mahr v. Pottawomie County Commrs.*, 26 Okl. 628, 110 Pac. 751.)

Extrinsic evidence is not admissible to vary or explain this record. (*Gorman v. Boise County Commrs.*, 1 Ida. 553; *Ex parte Young*, 154 Cal. 317, 97 Pac. 822, 22 L. R. A., N. S., 330; 17 Cyc. 582.)

Soule & Soule, for Respondents.

"The legislature intended to provide how two different kinds of school districts might be organized by the board of county commissioners, one upon petition and the other by a petition and vote." (*Wood v. Independent School Dist.*, 21 Ida. 734, 124 Pac. 780.)

In this instance it was not sought to vary the public record, but simply to explain and identify it, and this is permissible under all the authorities. (17 Cyc. 587.)

If the members present agree to and approve the passing of the petition, it is passed as effectively as if done upon formal motion. The statute does not require the minutes of the board to be approved by the board at any meeting or while in session. The only requirement is that the chairman and

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clerk sign the minutes. (*People v. Eureka Lake & Y. C. Co.*, 48 Cal. 143.)

It is the consent, sanction and approval by signing that gives legal life and vitality to the order and not the formality with which it was passed. (11 Cyc. 394; *Rock v. Rinehart*, 88 Iowa, 37, 55 N. W. 21.)

RICE, J.—This is an appeal from a judgment of the district court affirming the action of the board of county commissioners of Madison county in organizing school district No. 39 out of a portion of the territory embraced in school district No. 12 of said county. It appears that a petition for the formation of a new school district was filed with the superintendent of public instruction of Madison county on June 15, 1914. The petition was accompanied by a map. Proper notice was given of the hearing of the petition before the board of county commissioners at its next regular session in July. This petition and map were presented to the board on July 14, 1914. The county superintendent appeared personally before the board, and verbally approved the petition and recommended some modification of the proposed boundaries.

Appellants specify as error the admission of this petition in evidence upon the hearing in the district court. The error is predicated upon the proposition that from the record of the proceedings of the commissioners the identification of the petition upon which the commissioners took action does not clearly appear. On the trial in the district court evidence was received to identify the petition as the one which was the subject of action by the commissioners. The admission of this evidence was proper. On the general subject of the admission of extrinsic evidence to identify papers or records, see 10 R. C. L. 1083. The findings of the trial court set out the petition at length, and found that the petition referred to is the one on which the board of commissioners acted. Exhibit "A" was properly received in evidence.

The appellants further urge that the board of commissioners had no jurisdiction or power to grant the petition. In

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support of this contention it is shown that district No. 12, out of which it was proposed to create the new district, had been formed on April 13, 1911, at a time when the territory was still within the county of Fremont, by the consolidation of two school districts of that county. The consolidation of these districts was effected by an order of the board of commissioners of Fremont county, acting under authority of sec. 615, Rev. Codes. It is urged that this section required the petition of a majority of the heads of families residing in each of the two districts in order that they might be united into one district, and that this district so formed is a "consolidated school district." Attention is called to the fact that the substance of sec. 615, Rev. Codes, was re-enacted into the school code of 1911 (sec. 47 of chap. 159, 1911 Sess. Laws, p. 500); that this section was amended by the 1913 Sess. Laws, p. 437, by which amendment such consolidated school districts were given an unquestioned legal standing. Counsel for respondents contend that the section last referred to requires the indorsement of the state board of education before any district can be recognized as a "consolidated district," and that no such indorsement was shown to have been made.

The said sec. 47, School Code 1911, was again amended by chap. 119, 1913 Sess. Laws, p. 462. In *Carlson v. Mullen*, 29 Ida. 795, 162 Pac. 332, this court held that this latter amendment contains sec. 47 as now in force. Said sec. 47 as now amended makes no reference to consolidated districts. It is true that sec. 67, School Code 1911, 1911 Sess. Laws, p. 511, makes reference to "districts organized under the consolidated plan," but that section has no bearing upon the matters before the court.

It is argued that since it required a majority of the heads of families residing in each of the two districts to confer jurisdiction upon the board of commissioners to combine such districts into one district, to permit a succeeding board of commissioners to create a new district out of a portion of the territory so combined would destroy the object of the law. We cannot agree with this contention. The different provisions of sec. 47 grant power to the boards of county com-

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missioners to create new districts, to change the boundaries of existing districts, or to unite two or more districts, lying contiguous, into one district. A district formed by the union of two or more existing districts does not occupy any different position after the consolidation and is not invested with any different or additional powers. The law confers upon boards of county commissioners the power to create new districts, whether they be created from unorganized territory or in part from territory embraced within the boundaries of one or more districts, upon a petition signed by the parents or guardians of fifteen or more children of school age who are residents of the proposed new district. The petition in this instance was sufficient, and conferred upon the board of county commissioners power to create the new district prayed for.

There is nothing in the case of *Wood v. Independent School Dist. No. 2*, 21 Ida. 734, 124 Pac. 780, cited by appellants, to support their contention. In that case the court held that the board could not change the boundaries of an independent school district on petition. In the course of its opinion the court said: "If it requires the vote of those within a proposed independent school district to create an independent school district, and such independent school district can be divided or the boundaries changed upon petition by the board of county commissioners, then the vote of the people for the organization of an independent school district would amount to nothing, as the commissioners could change the same and destroy it by petition alone."

In the case at bar the district which it was proposed to divide was not created by a vote of the people, but by the action of the board of commissioners, and the statute nowhere prohibits a future board from changing the boundaries or dividing the district upon a proper petition therefor being presented. On the contrary, the statute expressly confers the power.

Error is assigned as to the action of the court in permitting the county superintendent to testify as to whether or not he approved of or recommended the creation of the school

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district prayed for in the petition. It is urged that the statute requires his approval or disapproval of the petition to be in writing and to become a part of the record.

The statute referred to is a portion of sec. 48, chap. 159, *Se s. Laws 1911*, p. 501, and is as follows:

“ . . . The Superintendent must transmit the said petition to the said Board with his approval or disapproval, and, if he approve the same, he may note such change in the boundaries as in his judgment shall be for the best interests of all parties concerned.”

This statute does not require the recommendation of the superintendent to be in writing. The board of commissioners is not bound by the recommendations made by the superintendent, but may act in a manner directly contrary thereto. It cannot be held that the recommendation of the superintendent in writing is necessary to give the board jurisdiction to act.

The appellants also assign as error the finding of the district court to the effect that the board of commissioners made and entered the order from which the appeal was taken to the district court. At the trial in the district court the appellants introduced testimony in support of their contention that the order appealed from as it appeared in the minutes of the board did not represent any action of the board, but, on the contrary, was the act of the clerk only; that the board took no action while in session, but at the time of adjournment the chairman of the board when asked by the clerk as to what action it was going to take on the petition informed him that it would pass it; that the clerk thereupon proceeded to make a pencil notation of the action the chairman of the board said would be taken, and several days later made up a written order from his penciled notation, and that some time subsequently the minute was signed by the chairman. Appellants contend that the clerk wrote up the order without authority.

It would be sufficient answer to this assignment of error to hold that other testimony was introduced at the trial sufficient to warrant the trial judge in making the finding complained of. We think, however, that the appellants are

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estopped from urging this assignment. They appealed from a certain order of the board to the district court, setting out the order appealed from *in haec verba*. Unless the order appealed from was in fact the order of the board, the appeal must fail and the district court had no jurisdiction to proceed with the hearing. It is true that the appeal is a direct attack on the order, and the validity of an order appealed from may be questioned on appeal by showing lack of jurisdiction in the board to make the order, or by showing irregularity in the proceedings which culminated in the order appealed from, but every appeal must be predicated upon the existence of an order from which the appeal is taken.

Sec. 1953, Rev. Codes, provides that upon the appeal the matter must be heard anew and the act, order or proceeding so appealed from may be affirmed, reversed or modified. If that which is appealed from is as a matter of fact not an order of the board, but a mere interpolation in the record by the clerk, the court could not affirm, reverse or modify, but could only dismiss the appeal.

Having by their own act in appealing from the order of commissioners set the district court in motion to hear the matter anew, and having themselves brought the record into the district court, the appellants cannot be heard during the proceedings on appeal to urge the nonexistence of the order appealed from. To permit such a proceeding would be in effect to permit a collateral attack upon the order under the guise of a direct attack.

The judgment is affirmed. Costs awarded to respondents.

Budge, C. J., and Morgan, J., concur.

(October 31, 1917.)

HANS P. HANSEN, Respondent, v. BOISE PAYETTE
LUMBER COMPANY, a Corporation, Appellant.

[168 Pac. 163.]

BILL OF EXCEPTIONS—SETTLEMENT BY SUPREME COURT.

1. Where a petition has been presented to this court asking that a reporter's transcript be settled as a bill of exceptions and the reporter's transcript does not accompany the petition, there is nothing before this court upon which it can act.

2. Under the statutes of this state the supreme court has no power to settle an entire bill of exceptions, but its power is restricted to those cases where the trial court failed to allow an exception and not where the court refused to settle the transcript as a whole.

Original application to settle reporter's transcript. *Denied.*

Edwin Snow, for Appellant.

J. J. McCue and J. G. Johnston, for Respondent.

RICE, J.—This is an original application to this court to settle a reporter's transcript under sec. 4432, Rev. Codes, and rule 9 of this court.

The respondent recovered a judgment against the appellant in the trial court, from which judgment the appellant filed notice of appeal to this court and had a reporter's transcript prepared. This appeal was subsequently dismissed on the grounds that the same was prematurely taken. A second notice of appeal was filed on April 21, 1917, at which time the completed reporter's transcript from the previous appeal was in the hands of the appellant's attorney. However, the reporter's transcript was not served upon the opposing counsel until June 5, 1917. The trial court refused to settle the transcript upon application on the grounds that the transcript was not served upon the opposing counsel within the time prescribed by subd. 2, chap. 119, Sess. Laws 1911, p. 380. The

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appellant has not presented the transcript to this court for settlement, and has furnished this court with nothing but its petition. It would therefore seem that under the authority of *Dernham v. Lieuallen*, 4 Ida. 528, 43 Pac. 74, there is nothing before this court on which to act.

This application is not to prove an exception in accordance with the facts which the trial judge refused to allow, but an application to settle the entire bill of exceptions which the trial judge refused to do. Sec. 4432, Rev. Codes, is identical with sec. 652, Code of Civil Procedure of California, prior to its amendment. The California courts construed the above section, while the same was in force in that state, to be applicable only to those cases where the trial court failed to allow an exception and not where the court refused to settle the transcript as a whole.

In the case of *Landers v. Landers*, 82 Cal. 480, 23 Pac. 126, the court said:

“Sec. 652 was not intended to apply and does not apply to the case where a trial judge has refused to settle a statement or bill of exceptions. The remedy if such refusal is wrongful is *mandamus* to compel him to act. The law does not impose upon the appellate court the general duty of settling a bill of exceptions. Sec. 652 applies to a case where the trial judge, in settling a bill, refuses to allow an exception which ought to be allowed. The language is, ‘if the judge in any case refused to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same,’—that is, to prove the exception which the judge is alleged to have refused to allow in accordance with the facts.”

In *Tibbets v. Riverside Banking Co.*, 97 Cal. 258, 32 Pac. 174, the court said:

“That section only provides that where, upon the settlement of a bill of exceptions or statement, the judge refuses to allow an exception, the party may petition this court to prove said exception, but in this case the petitioners merely show that they presented quite a lengthy statement on motion for a new trial to the judge of the superior court, and that he refused

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to sign it, or any other bill of exceptions. In such case the judge can be compelled by *mandamus* to settle the bill or statement; but this court has not the power, nor is it its duty, to take the place of the judge of the lower court, and perform the duty of settling the statement." (*Hyde v. Boyle*, 86 Cal. 352, 24 Pac. 1059; *Hudson v. Hudson*, 129 Cal. 141, 61 Pac. 773; *Estate of Dolbeer*, 147 Cal. 359, 81 Pac. 1098.)

The power to settle a bill of exceptions is statutory, and a strict construction is necessary.

In the case of *Hyde v. Thornton* (*Hyde v. Boyle*), 83 Cal. 83, 23 Pac. 126, upon an application identical with the one at bar, the court said:

"But this court, in bank, has recently held, in the case of *Landers v. Landers*, [82 Cal. 480], ante [23 Pac. 126], that this is not the proper remedy in a case like the one here presented; that this court cannot substitute itself for the court below in the settlement of a general bill of exceptions. On the authority of that case this application must be denied, and the parties left to the remedy therein suggested, if the judge below still persists in his refusal to settle the bill."

In the case of *In re Gates*, 90 Cal. 257, 27 Pac. 195, the court said:

"Sec. 652 limits the authority of this court to interfere in the settlement of a bill to the single instance in which the judge 'refuses to allow an exception'; and we have no inclination, even if we had the power, to extend this authority beyond the limits prescribed by the statute."

The same construction has been placed on an identical statute by the supreme court of Montana in the cases of *In re Plume*, 23 Mont. 41, 57 Pac. 408; *Harding v. McLaughlin*, 23 Mont. 334, 58 Pac. 865.

The petition is therefore denied.

Budge, C. J., and Morgan, J., concur.

Argument for Appellant.

(November 20, 1917.)

RAFT RIVER LAND & LIVESTOCK CO., a Corporation,
Appellant, v. S. H. LAIRD, Respondent.

[00 Pac. 000.]

**SALES—EXPRESS WARRANTY—SUFFICIENCY OF EVIDENCE—FRAUDULENT
INTENT—DUTY OF BUYER TO INVESTIGATE—RESCISSION—RETURN OF
PROPERTY.**

1. Where, in an action by the vendor to recover the purchase price of property sold, the purchaser, as a defense, relies upon a breach of express warranty and an election to rescind the contract, it is immaterial whether or not the vendor acted in good faith when he made the representations leading up to the sale.

2. In such a case it is not the duty of the purchaser to investigate the truth of the statements constituting the warranty.

3. This court will not disturb the verdict of a jury or the judgment of a trial court because of conflict in the evidence when there is sufficient proof, if uncontradicted, to sustain it.

4. What is a reasonable time within which a purchaser, who elects to rescind a contract of sale because of a breach of warranty must return, or offer to return, the property purchased, is a question of fact to be determined by the jury.

[As to privilege of returning goods purchased as bar to claim for breach of warranty, see note in *Ann. Cas.* 1915D, 1159.]

APPEAL from the District Court of the Fifth Judicial District for Power County. Hon. J. J. Guheen, Judge.

Action for debt. Judgment for defendant. *Affirmed.*

W. R. Griswold, for Appellant.

“To rescind a contract for the purchase of a chattel the property purchased should be returned, or offered to be returned, within a reasonable time, unless it is of no value to either party.” (*Gale Sulky Harrow Mfg. Co. v. Moore*, 46 Kan. 324, 26 Pac. 703; *Luger Furniture Co. v. Street*, 6 Okl. 312, 50 Pac. 125; 35 Cyc. 151; *Gifford v. Carvill*, 29 Cal. 589; *Robinson & Co. v. Roberts*, 20 Okl. 787, 95 Pac. 246; *Waymire v. Shipley*, 52 Or. 464, 97 Pac. 807.)

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“Retaining the goods without objection after discovery of the fraud or defect, and using, selling, or otherwise dealing with the property, will estop the buyer to rescind.” (35 Cyc. 141, 142; *Detroit Heating etc. Co. v. Stevens*, 16 Utah, 177, 52 Pac. 379; *Eagle Iron Works v. Des Moines Sub. Ry. Co.*, 101 Iowa, 289, 70 N. W. 193; *Morgan v. Thetford*, 3 Ill. App. 323; *Lyon v. Bertram*, 20 How. (61 U. S.) 149, 15 L. ed. 847.)

J. F. Nugent, J. P. Pope and Ross W. Bates, for Respondent.

“Whether the right to rescind was exercised within a reasonable time is usually regarded as a question for the jury.” (35 Cyc. 153, note 48.)

“In the case of a warranty it is immaterial whether the seller knew his statements were untrue or not.” (35 Cyc. 368, and cases cited.)

“Where there is an express warranty, the buyer is under no obligation to inspect or examine the goods purchased, but may rely on the warranty. The main purpose of a warranty is often to excuse examination and render examination unnecessary.” (35 Cyc. 378, and cases cited.)

“Where there is some evidence to support the verdict of the jury, the judgment will not be reversed.” (*Lott v. Oregon Short Line R. Co.*, 23 Ida. 324, 130 Pac. 88.)

MORGAN, J.—Appellant instituted this action to recover the purchase price of a mare sold by it, through one Crane, its agent, to respondent. Respondent's defense was that at the time of the sale appellant's agent expressly warranted that the animal was sound; that after the sale it was discovered to be so diseased and afflicted as to be of no value whatever and that after the discovery of the animal's defects he offered to return it to appellant. The jury returned a verdict for respondent and judgment was entered accordingly. From the judgment this appeal is taken.

The evidence is sufficient to disclose the fact that the mare was unsound, as alleged by respondent, and practically valueless.

Opinion of the Court—Morgan, J.

The testimony introduced by respondent, to sustain his claim that appellant warranted the soundness of the mare, was to the effect that during the time the sale was being negotiated Crane told him the animal was sound in every particular, and "I will absolutely guarantee that mare. If she does not prove satisfactory, you can bring her back any time." This evidence is sufficient to sustain the jury in finding that Crane warranted the soundness of the animal. (*Frey v. Failes*, 37 Okl. 297, 132 Pac. 342; 35 Cyc. 365.) It is true Crane disputed the testimony of respondent in this particular, but no rule is better settled in this state than that this court will not disturb the verdict of a jury or the judgment of a trial court because of conflict in the evidence when there is sufficient proof, if uncontradicted, to sustain it. Among the recent cases so holding is *Montgomery v. Gray* (on rehearing), 26 Ida. 583, 144 Pac. 646; *Graham v. Coeur d'Alene & St. Joe Transp. Co.*, 27 Ida. 454, 149 Pac. 509; *Bower v. Moorman*, 27 Ida. 162, 147 Pac. 496; *Darry v. Cox*, 28 Ida. 519, 155 Pac. 660; *Jensen v. Bumgarner*, 28 Ida. 706, 156 Pac. 114; *John V. Farwell Co. v. Craney*, 29 Ida. 82, 157 Pac. 382; *Sweeten v. Ezell*, 30 Ida. 154, 163 Pac. 612. The reason for this rule is that the jury is the exclusive judge of the credibility of the witnesses and of the weight and sufficiency of the evidence. It was within the province of the jury to, and it apparently did, discredit the testimony adduced by appellant to sustain its contention, and it is not for this court to say that it erred in returning the verdict it arrived at from the conflicting evidence before it.

Appellant contends that the court erred in giving certain instructions, and in refusing to give others which were requested by it, but, it is clear, this contention is based on the erroneous assumption that this action involved the question of fraud or deceit. Referring to the instructions refused by the court, appellant says in its brief: "These instructions were formulated and prepared under the provisions of the general rule of law in regard to rescission of contracts of sale for fraud." Its objection to the instructions given was

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that they omitted to charge the jury in respect to certain elements necessary where fraud is relied upon as a defense.

If respondent's defense had been based upon false representations alleged to have been made by appellant's agent, then it would have been necessary to prove that he made the representations knowing their falsity, or made them in reckless disregard of what the truth might be, but fraud is not essential to the establishment of a defense based on breach of warranty, and in such a case it is immaterial whether or not the vendor acted in good faith when he made the representations leading up to the sale. (*Klock v. Newbury*, 63 Wash. 153, 114 Pac. 1032.) Likewise, where a defense is a breach of express warranty by the vendor, there is no duty imposed by law upon the purchaser to investigate the truth of the statements constituting the warranty. (*Klock v. Newbury, supra*; *Frey v. Failes, supra*; *W. R. Grace & Co. v. Levy*, 30 Cal. App. 231, 156 Pac. 626; *Hull v. Dannen* (Iowa), 157 N. W. 188; *Vaupel v. Lamplly*, 181 Ind. 8, 103 N. E. 796.)

Appellant contends that respondent cannot, as a defense, rely upon an election to rescind the contract for breach of warranty, for the reason that he did not return, or offer to return, the property within a reasonable time after he discovered the defects of which he complained. Respondent's testimony was to the effect that when he became convinced the mare was so unsound as to be of no use, and upon learning the address of appellant, he wrote a letter offering to return her and, receiving no answer, wrote again, some time later, which last-mentioned letter brought a response and a refusal by appellant to receive the animal. This evidence tends to show respondent's diligence and that question was properly submitted to the jury by an instruction given to the effect that he must have offered to return the mare within a reasonable time.

We find no error in the record and the judgment is affirmed. Costs are awarded to respondent.

Budge, C. J., and Rice, J., concur.

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ACCOMPLICES.

See Criminal Law, 3.

ACTION.

Nature of Action.

1. In determining whether the nature of an action is legal or equitable the court must take into consideration the averments of plaintiff's petition or complaint and the body and substance of the ultimate relief sought. (Johansen v. Looney, 123.)

ADOPTION.

See Guardian and Ward, 4.

Order of Adoption.

1. A probate judge is not authorized to make an order of adoption of children without the consent of the parents on the ground that the parents have been judicially deprived of the custody of their children on account of neglect, unless it appears in the record before him that the parents have been permanently and absolutely deprived of such custody by a final and unconditional judgment of a court. An order of a probate court temporarily depriving the parents of the custody of their children, but granting them an opportunity to reclaim the children upon a proper showing of reform, is not such a judgment as dispenses with the necessity for the consent of the parents to an adoption proceeding. (Jain v. Priest, 273.)

2. Under sec. 2703, Rev. Codes, a probate judge is not authorized to make an order of adoption of children without the consent of their parents, on the ground that such parents have been judicially deprived of their children on account of neglect, unless it appears in the record before such judge that such is a fact. (Jain v. Priest, 273.)

3. As to whether the parents must in all cases be notified of adoption proceedings in order to make the same binding upon them, *quære*. (Jain v. Priest, 273.)

ADVERSE POSSESSION.

1. Where a party has entered into possession of land under claim of title, founded upon a written instrument as being a conveyance of the property in question, and has held it adversely for a period of more than five years, and in all other respects con-

APPEAL AND ERROR (Continued).

codefendants is essential to the validity of his appeal, since they are adverse parties to the extent that their interests would be affected by the result of such appeal. (Glenn v. Aultman & Taylor Machinery Co., 727.)

8. Where a notice of appeal is addressed to certain parties, naming them, its legal effect is limited to such parties only. (Glenn v. Aultman & Taylor Machinery Co., 727.)

9. Where the notice of appeal is not filed until after the expiration of the time fixed by statute, this court acquires no jurisdiction of the cause. (Glenn v. Aultman & Taylor Machinery Co., 919.)

Waiver of Notice of Appeal.

10. Where an appeal was taken from the probate court to the district court and notice of appeal was not served, but nevertheless the party opposing the appeal voluntarily appeared and asked leave to file an answer and proceeded to a trial of the cause without raising any objection to the jurisdiction of the court upon the ground of lack of notice, such procedure amounts to a waiver of the absence of notice of appeal, and the question cannot be raised for the first time on appeal to the supreme court. (Bates v. Price, 521.)

Filing of Praecipe.

11. The statute requiring the filing of a *praecipe* within five days after the filing of notice of appeal is directory and not mandatory. The time of filing the *praecipe* may be considered in connection with the question of diligence in taking the appeal. (Bohannon Dredging Co. v. England, 721.)

Transcript.

12. The action of the trial court in overruling motion for new trial, based in part upon the minutes of the court, cannot be reviewed where the record of appeal fails to contain a transcript of the evidence duly settled by the trial judge. (Wells v. Culp, 438.)

13. A transcript of the evidence not duly certified and settled by the trial judge cannot be considered on appeal, either from the judgment or from the order overruling the motion for new trial. (Wells v. Culp, 438.)

14. Service of the clerk's transcript of the record and the reporter's transcript of the testimony, as provided for by secs. 4820-A and 4434, Rev. Codes, is mandatory. (Bohannon Dredging Co. v. England, 721.)

15. The reporter's transcript of the testimony, provided for by sec. 4434, Rev. Codes, is not required to be settled or filed prior to the hearing of a motion for a new trial. (Bohannon Dredging Co. v. England, 721.)

APPEAL AND ERROR (Continued).

16. A failure to file and serve transcript on appeal within the time specified by the rules of this court does not divest this court of jurisdiction. (*Wolter v. Church*, 427.)

17. A stipulation for obtaining an extension of time within which to file transcript on appeal to this court should be obtained before the time limited by the rules of this court for filing such transcript has expired. (*Wolter v. Church*, 427.)

18. The transcript containing the record on appeal imports verity, and is the conclusive evidence of the proceedings in the lower court. (*Athey v. Oregon Short Line R. R. Co.*, 318.)

Dismissal of Appeal—In General.

19. Under the existing statute an appeal from the district court to the supreme court, taken prior to the entry of the judgment in the judgment-book, does not confer jurisdiction upon the supreme court, and will be dismissed. (*Athey v. Oregon Short Line R. R. Co.*, 318.)

20. Subd. 2, sec. 4807, Rev. Codes, as amended, *supra*, provides an appeal may be taken to the supreme court from a district court, from an order granting or refusing a new trial, within thirty days after the order is made and entered on the minutes of the court or filed with the clerk. Where an order denying a new trial was made on the 16th day of December, 1913, and no appeal was taken therefrom within thirty days from the entry thereof, the same is subject to dismissal. (*Thompson v. Harris*, 109.)

21. An appeal from an order overruling motion for a new trial is not subject to dismissal for the reason that notice of motion in the district court was not served upon the adverse parties or their counsel. A motion to dismiss an appeal only presents the question of whether or not the requirements of the statutes and rules as to the mode of taking the appeal have been followed. (*Bohannon Dredging Co. v. England*, 721.)

— For Failure to Serve Adverse Parties With Notice of Appeal.

22. Where it appears that the notice of appeal has not been served upon all of the adverse parties, the appeal will be dismissed on motion, as such an appeal confers no jurisdiction upon this court under section 4808, Rev. Codes. (*Cook v. Miller*, 749.)

23. An appeal will be dismissed where it appears that the notice of appeal has not been served upon all of the adverse parties whose interest might be affected by a reversal or modification of the judgment. (*Glenn v. Aultman & Taylor Machinery Co.*, 727.)

— Transcript.

24. A transcript on appeal must be filed in this court within the time prescribed by the court rules; otherwise, in the absence of a

APPEAL AND ERROR (Continued).

proper showing excusing the failure to do so, the appeal will be dismissed. (*Bohannon Dredging Co. v. England*, 721.)

25. Where a motion to dismiss for failure to file transcript within the time specified by rule 26 of the rules of this court is made upon notice, and a showing is made in opposition to such motion, the showing should be sufficient to justify the court in reinstating the case if it had been previously dismissed without notice. (*Wolter v. Church*, 427.)

26. Where upon appeal to this court a transcript has not been filed within the time limited by the rules, such appeal will be dismissed upon motion in the absence of a sufficient showing of diligence. Facts examined and showing of diligence in the prosecution of the appeal held to be insufficient. (*Wolter v. Church*, 427.)

26a. Where the transcript or record on appeal from an order denying a motion for a new trial does not contain a certificate of the trial judge, clerk or attorneys that the papers therein contained constitute all of the records, papers and files considered and acted upon by the trial court, upon the hearing of the motion, as required by sec. 4821, Rev. Codes, and Rule 24 of the rules of this court, the appeal must be dismissed. (*Glenn v. Aultman & Taylor Machinery Co.*, 719.)

27. Where a transcript on appeal does not contain a certificate from either the trial judge, the clerk or the attorneys that it contains all the records, papers and files used or considered by the trial judge upon the hearing of a motion to correct the judgment, as required by sec. 4821, Rev. Codes, and Rule 24 of the rules of this court, the appeal must be dismissed. (*Glenn v. Aultman & Taylor Machinery Co.*, 727.)

28. *Held*, where the transcript or record on appeal from an order or contested motion does not contain a certificate that the papers therein contained constitute all the records, papers and files used or considered by the judge making the order on the hearing of the motion, as required by sec. 4821, Rev. Codes, and rule 24 of this court, the appeal will be dismissed under rule 27 of this court, on the court's own motion. (*Walsh v. Niess and Utaida Rod and Gun Club*, 325.)

Review of Instructions.

29. Where certain instructions of the trial court are erroneous, but are in fact more favorable to appellant than a correct statement of the law would justify, appellant cannot be said to have been prejudiced by the giving of such instructions, and is not in a position to complain of the verdict arrived at, on the ground that such instructions were given. (*Saccamonno v. Great Northern Ry. Co.*, 513.)

APPEAL AND ERROR (Continued).

30. *Held*, that the trial court committed no error in regard to the admission of evidence, the giving of certain instructions and refusal to give certain offered instructions, and in refusing to grant appellant a new trial. (*Bates v. Price*, 521.)

Presumptions.

31. Where a jury might have arrived at their verdict upon different theories of the case, one of which would involve disregard of the instructions of the court, and the other a due regard for such instructions, it must be presumed that the jury followed the court's instructions in arriving at their verdict. (*Saccamunno v. Great Northern Ry. Co.*, 513.)

Direction of Verdict.

32. *Held*, that the trial court did not err in directing the jury to return a verdict for defendant. (*Libby v. Pelham*, 614.)

33. *Held*, that under the facts and law of this case, the trial court committed no error in instructing the jury to return a verdict for respondent. (*Milner v. Pelham*, 594.)

Review of Evidence.

34. Evidence examined and *held* sufficient under a written contract to sustain the findings of the trial court to the effect that the respondents did not assume and agree to pay the indebtedness secured by mortgage of appellant, Consolidated Wagon & Machine Co. (*Green v. Consolidated Wagon & Machine Co.*, 359.)

35. *Held*, that the evidence in this case shown by the record is sufficient to support the findings and judgment of the lower court. (*Rees v. Gorham*, 207.)

No Disturbance of Findings, Verdict, or Judgment, Where Evidence is Conflicting.

36. In a suit in equity, as well as in an action at law, a finding of fact made by the trial judge, who has had the benefit of observing the demeanor of witnesses upon the stand and of listening to their testimony, will not be disturbed, because of conflict, if the evidence in support of the finding, if uncontradicted, is sufficient to sustain it. (*Davenport v. Burke*, 599.)

37. A finding of the trial court based upon substantially conflicting evidence will not be disturbed. (*Holland v. Avondale Irr. Dist.*, 479.)

38. Where there is a substantial conflict in the evidence, neither the findings nor judgment of the trial court will be disturbed on appeal. (*Hayton v. Clemons*, 25.)

APPEAL AND ERROR (Continued).

39. Where there is a substantial conflict in the evidence the verdict of the jury will not be disturbed. (*Saccamunno v. Great Northern Ry. Co.*, 513.)

40. Where the evidence is conflicting and sufficient, the verdict of the jury will not be disturbed. (*Maney v. Idaho Construction Co.*, 111.)

41. The evidence in this case is conflicting, and, under the theory upon which the case was tried, sufficient to support the verdict and judgment. (*Dore v. Cottom*, 696; *Dore v. Benedict*, 731.)

42. An appellate court will not disturb the judgment of a trial court because of conflict in the evidence where there is sufficient proof, if uncontradicted, to sustain it. (*Sweeten v. Ezell*, 154.)

43. This court will not disturb the verdict of a jury or the judgment of a trial court because of conflict in the evidence when there is sufficient proof, if uncontradicted, to sustain it. (*Raft River Land & Livestock Co. v. Laird*, 804.)

Denial of Motion for New Trial.

44. The action of the trial court in denying a motion for a new trial on the ground of newly discovered evidence is not error when the affidavits, filed in support thereof, disclose that such evidence relates to matters not embraced within the issues or is cumulative to that introduced at the trial. (*St. Regis Lumber Co. v. Turner Lumber & Mfg. Co.*, 555.)

Harmless Error.

45. *Held*, that the instructions requested by appellant and refused, also the instructions given, disclose no error prejudicial to appellant. (*Dore v. Cottom*, 696; *Dore v. Benedict*, 731.)

46. Where in a trial to the court without a jury, the court denies a motion to strike testimony as to the receipt of money by draft in exchange for the return of a deed, based on the ground that the deed and draft are the best evidence, and testimony is subsequently introduced showing that the deed was burned and never recorded, that the person who sent the draft for the drawer thereof was dead, that neither the drawer nor drawee knew where the draft was procured and that the records of the bank at which the draft was cashed were lost or destroyed, the error in refusing to strike the testimony was not prejudicial. (*McKeehan v. Vollmer-Clearwater Co.*, 505.)

Affirmance of Judgment

47. *Held*, where in an action upon an express contract for the payment of money, the trial court finds all of the facts in favor of plaintiff, and the findings are sustained by the evidence, the judg-

APPEAL AND ERROR (Continued).

ment for plaintiff will be affirmed. (*Kinsolving v. Milwaukee Lumber Co.*, 612.)

Reversal of Judgment—In General.

48. Even if certain testimony of a physician should have been excluded on the ground of privileged communication, still the admission of it is not reversible error where the patient, who was also a witness, testified on her cross-examination to substantially everything to which the doctor testified. As to whether the testimony should have been admitted over the objection of appellant, there being nothing in the record to show that the witness expressly consented that the testimony might be given, *quære*. (*Jain v. Priest*, 273.)

— *Because of Instructions.*

49. An instruction should not be given unless founded on the issues in the case or evidence received at the trial. But where, by examination of instructions given in the trial, it appears that the giving of such instruction did not result in any substantial injury to appellant, the judgment will not be reversed. (*Austin v. Brown Brothers Co.*, 167.)

50. A judgment will not be reversed where it appears that the jury took cognizance only of matters proper for their consideration, even though the jury was erroneously instructed. (*Austin v. Brown Brothers Co.*, 167.)

51. An instruction which directed the jury, in the event they found for plaintiff, to assess his damages and then add interest at the rate of seven per cent per annum from the date of the discovery of the true character of the fruit trees to the date of trial, is erroneous; but, where it appears that the prevailing party has offered to remit the interest erroneously included in the judgment in accordance with such instruction, a judgment for damages will not be reversed on account of such error, when the amount by which the verdict was thereby increased is easily ascertainable and the proper deduction can be made with certainty. (*Graham v. Brown Brothers Co.*, 651.)

— *Because of Misconduct of Counsel.*

52. Statements of counsel to the jury which are not justified by anything in the record and are manifestly made for the purpose of inciting the passion or prejudice of the jury, constitute reversible error, unless it appears from the whole record that the jury could not lawfully have reached any other conclusion than they did. (*Bates v. Price*, 521.)

APPEAL AND ERROR (Continued).

53. *Held*, that misconduct of counsel in this case in addressing prejudicial remarks to the jury did not constitute reversible error, since it appears from the record that the verdict of the jury was fully justified by the evidence adduced on the trial. (*Bates v. Price*, 521.)

See Costs; Criminal Law, 5; Drains; Exceptions, Bill of.

APPEARANCE.

1. A stipulation between the attorneys made during the time in which an appeal could properly have been taken, extending the time in which to file briefs, is not such an appearance as would confer jurisdiction upon the appellate court. (*Athey v. Oregon Short Line B. B. Co.*, 318.)

ASSESSMENTS.

See Drains, 3-17; Municipal Corporations, 5-15; Waters and Water-courses, 28.

ATTACHMENT.

1. Real estate may be attached under and by virtue of a writ of attachment issued out of a justice's or probate court. (*Hanson v. Morrison*, 422.)

2. Before recovery can be had because of an attachment procured wrongfully, maliciously and without probable cause, it must be shown that the property alleged to have been attached was actually levied upon in substantial conformity with sec. 4307, Rev. Codes (amended, Sess. Laws 1911, chap. 162, p. 559). (*Long v. Burley State Bank*, 392.)

3. Loss of profits in business is an element of damage where the attachment was procured with malice and without probable cause, but may be recovered only upon the production of such evidence as will enable the jury to calculate, with a reasonable degree of certainty, the amount of damage resulting from such loss. (*Long v. Burley State Bank*, 392.)

4. Malice and want of probable cause, if relied upon as an element of damage, must be alleged and proved. The jury may infer malice from the want of probable cause, but it may not infer want of probable cause alone from the fact that the suit in aid of which the attachment issued was decided against the party procuring it. (*Long v. Burley State Bank*, 392.)

BANKS AND BANKING.

1. According to the intent and purpose of sec. 173 of the Revenue Act of 1913 (Sess. Laws 1913, p. 230), the proportion of

BANKS AND BANKING (Continued).

the capital stock, surplus and undivided profits of a bank invested in or represented by property outside of the county in which the bank is located is not to be deducted from the full cash value of its capital stock in listing the same for assessment. (Weiser Nat. Bank v. Washington County, 332.)

BENEVOLENT ORGANIZATIONS.

See Guardian and Ward, 1-6.

BILL OF EXCEPTIONS.

See Exceptions, Bill of, 1.

BILLS AND NOTES.

1. One who holds a note by assignment for the purpose of collection is the real party in interest in his own name. (Utah Implement-Vehicle Co. v. Kenyon, 407.)

2. An indorsee, who is in possession of a promissory note, is the "holder" thereof, and may sue thereon in his own name. (Utah Implement-Vehicle Co. v. Kenyon, 407.)

3. Evidence examined and held insufficient to establish respondent's claim that there was a conditional delivery of the note. (Citizens' State Bank of Sandpoint v. Thomason, 460.)

4. Evidence examined and held sufficient to establish that the note was delivered as a present obligation. (Citizens' State Bank of Sandpoint v. Thomason, 460.)

BONA FIDE PURCHASER.

See Execution, 2.

BREACH OF WARRANT.

See Sales, 4.

CANAL.

See Highways.

CAPITAL STOCK.

See Corporations, 1-4.

CAREY ACT LANDS.

See Public Lands, 4; Waters and Watercourses, 8, 24, 26.

CAREY ACT PROJECTS.

See Mandamus, 6.

CATTLE.

See Animals.

CERTIFICATES.

See Schools and School Districts, 4.

CERTIORARI.

See Review, Writ of, 1.

CHANGE OF VENUE.

See Venue, 1-5.

CHARITABLE ORGANIZATIONS.

See Guardian and Ward, 1-6.

CHATTEL MORTGAGES.*Lien of Mortgage.*

1. Evidence examined and found sufficient to sustain the findings of the lower court to the effect that the chattel mortgages in question were valid and subsisting liens upon the crop of barley, and that appellant wrongfully and unlawfully converted a portion of the same to its own use. (*Averill Machinery Co. v. Vollmer-Clearwater Company*, 587.)

2. The lien of a chattel mortgage executed upon a crop to be grown upon leased premises does not attach to a crop subsequently planted thereon by another than the lessee. (*Green v. Consolidated Wagon & Machine Co.*, 359.)

3. If personal property situated in a foreign state is there encumbered by a mortgage duly executed and recorded so as to create a valid lien thereon and if it is thereafter, with the consent of the mortgagee, removed into Idaho and is here sold to a purchaser who has no knowledge of the encumbrance, such purchaser takes title which is not subject to the lien of the mortgage. (*Moore v. Keystone Driller Co.*, 220.)

Comity Between States.

4. By reason of comity between states, if personal property situated in a given state is there mortgaged by the owner and the mortgage is duly executed and recorded as by the local law required so as to create a valid lien, and if the property is thereafter removed into another state and is there sold to a purchaser without knowledge of the encumbrance, such purchaser takes title subject to the lien of the mortgage although it has not been recorded in the latter state, and this is particularly true when the removal is accomplished without the knowledge or consent of the mortgagee. (*Smith v. Consolidated Wagon & Machine Co.*, 148.)

CHILDREN.

See Parent and Child.

CHILDREN'S HOME FINDING AND AID SOCIETY.

See Guardian and Ward, 4.

CLAIMS.

See States, 1-6.

CLOUD ON TITLE.

See Quieting Title, 1-3.

COMITY BETWEEN STATES.

See Chattel Mortgages, 4; Contracts, 8.

CONSTRUCTION COMPANY.

See Waters and Watercourses, 8, 9, 21, 25.

CONSTRUCTIVE TRUSTS.

See Trusts.

CONTRACTS.

Effect of Illegality.

1. Where a statute prescribes a license, or certificate, as a requisite to engaging in business, and where such is required for public protection or is a police regulation and not for revenue purposes only, a contract made in violation thereof is invalid and no recovery can be based thereon. (*Zimmerman v. Brown*, 640.)

2. Rights based on a violation of law will not be enforced, and if a transaction is illegal because in contravention to a statute, it will not be upheld in any way, but the parties will be left in the situation in which they have voluntarily placed themselves. (*Libby v. Pelham*, 614.)

Construction and Operation—Sale of Fruit Trees.

3. Where a contract for the sale of fruit trees, prepared by the seller to be signed by the buyer contains a provision that "any stock which does not prove to be true to name as labeled is to be replaced free or purchase price refunded," such contract contains an implied condition precedent requiring a substantial performance by the seller, for the breach of which the buyer is entitled to compensatory damages, and the foregoing provision of the contract applies only to such mistakes as are liable to occur in the substantial performance of the contract. (*Austin v. Brown Brothers Co.*, 167.)

CONTRACTS (Continued).

4. Where three persons gave individual orders complete in themselves for nursery stock to an agent of a nursery company, and thereupon, at the suggestion of the agent, the three orders were combined in one and signed by one of the three, *held*, that under the facts of this case the combined order became a separable contract. (*Austin v. Brown Brothers Co.*, 167.)

— *Measurement of Hay.*

5. Where it is provided in a contract that certain hay is to be measured according to the "government rule," and parol evidence is introduced to disclose the fact that there were several rules known as "government rule," and that the minds of the parties did not meet as to what government rule the provision in the contract referred to, such provision is void. (*Snoderly v. Bower*, 484.)

— *Railroad Construction Work.*

6. A contract for the construction of railroad work which provides that the chief engineer shall have the right to decide all questions arising between the parties thereto relative to said work, and as to the true intent and meaning of the provisions and specifications of the contract and the specifications under which the work is to be done, and that his decision shall be binding upon all parties to the agreement, does not make the estimates of quantities made by the chief engineer binding upon the parties. (*Maney v. Idaho Construction Co.*, 111.)

7. A contract for the construction of railroad work which provides that the subcontractor shall be paid as per chief engineer's estimate sheet does not make the estimates of the chief engineer final and conclusive upon the parties to the contract. (*Maney v. Idaho Construction Co.*, 111.)

Comity Between States.

8. In order to invoke the doctrine of comity between states with respect to contracts, it is incumbent upon a party claiming such a benefit to show that his is such a contract as is contemplated by the doctrine. He must produce proof that the contract in behalf of which he seeks to invoke this rule is a foreign contract contemplated by the rule. (*Smith v. Consolidated Wagon & Machine Co.*, 148.)

Pleading.

9. Under sec. 4201, Rev. Codes, the failure to deny a written instrument contained in the answer as therein required admits the genuineness and due execution of such instrument, but the plaintiff is not precluded thereby from taking any position in avoidance of the contract which is not inconsistent with the admission of its

CONTRACTS (Continued).

genuineness and due execution. (*Austin v. Brown Brothers Co.*, 167.)

10. Where the pleadings are based upon an express provision in a contract fixing a rule of measurement, and nothing further, and it is shown conclusively from the evidence that there was no contract upon that point between the parties, the pleadings will not support the judgment. (*Snoderly v. Bower*, 484.)

Actions in General—Evidence.

11. In an action for the amount due for the construction of a railroad roadbed under a contract which does not make the estimates furnished by the chief engineer final and conclusive upon the parties, it is proper for the trial court to receive competent evidence to disclose the errors and mistakes of such estimates, if any there be. Such evidence is admissible without reference to the question of fraud or bad faith on the part of the engineer. (*Maney v. Idaho Construction Co.*, 111.)

12. Copies of contract orders for trees, which were afterward merged in a single contract between the parties, may be properly received in evidence as showing specific acts of the parties in making the contract and the steps which were taken leading up to the making of the final contract and the execution thereof. (*Graham v. Brown Brothers Co.*, 651.)

13. Where by the undisputed testimony there is clearly a substantial failure of performance on the part of one of the parties to the contract, it is the duty of the court so to declare as a matter of law. (*Austin v. Brown Brothers Co.*, 167.)

Instructions.

14. The following instruction was given in this case: "Where fruit trees are sold under a warranty, express or implied, that they are of the kind selected and they prove to be not of such kinds in part or whole, the measure of damages is the difference in value between the orchard actually grown from the trees received, at the next planting time after the discovery of the breach, and the value which such orchard would have had if the trees had been as warranted. . . . " *Held*, that under the facts, as shown by the record, the giving of such instruction, without the inclusion of the words "at the same time deducting the cost of taking care of such trees," was not erroneous. (*Graham v. Brown Brothers Co.*, 651.)

Rescission of Contract.

15. In an action for the rescission of a contract, the complaint need not show that prior to the commencement of the action plaintiff offered to place defendant *in statu quo*. (*Hayton v. Clemons*, 32.)

CONTRACTS (Continued).

16. Where the complaint in an action for the rescission of a contract shows that the consideration received by plaintiff was an interest in land under a contract of purchase, and that such contract has been foreclosed by decree for default in payments due thereunder, which payments defendant represented to plaintiff had already been made, it is not necessary that the complaint should offer to restore to defendant the consideration received as a condition precedent to plaintiff's right to cancelation and rescission. (*Hayton v. Clemans*, 32.)

17. Where an action is brought to rescind a contract, to cancel and hold for naught a deed made and delivered, and to secure the recovery of a promissory note given at the time of, and in connection with, the making of the contract and deed, and for a reasonable rental of the premises possessed by defendant subsequent to the making and delivery of the deed, and the complaint alleges that the contract was entered into and the deed and promissory note made and delivered as the result of false and fraudulent representations of defendant known by him to be false and fraudulent when made, and to have been made with the intent to deceive the plaintiff and to have him act upon them, and that the plaintiff relied and acted upon such false and fraudulent representations and thereby suffered injury: *Held*, that the complaint states facts sufficient to constitute a cause of action. (*Hayton v. Clemans*, 25.)

See Work and Labor, 1.

CONTRIBUTORY NEGLIGENCE.

See Negligence.

COPIES OF RECORDS.

See Corporations, 5.

CORPORATIONS.***Increasing or Diminishing Capital Stock.***

1. Where a corporation seeks to amend its articles of incorporation by increasing or diminishing its stock, a strict compliance with the statutory requirements precedent thereto is necessary. (*Farmers & Traders' Bank v. National Laundry & Linen Supply Co.*, 788.)

2. Where a corporation seeking to increase its capital stock fails to pass a resolution by the directors calling a meeting of the stockholders for such purpose, any attempted increase of the stock is ineffective and void. (*Farmers & Traders' Bank v. National Laundry & Linen Supply Co.*, 788.)

3. A failure to give notice of a stockholders' meeting called for the purpose of increasing the capital stock of such corporation as

CORPORATIONS (Continued).

is required by the statute will render an attempted increase of the stock void. (*Farmers & Traders' Bank v. National Laundry & Linen Supply Co.*, 788.)

4. Equity will restrain the corporation and those attempting to act by virtue of an unauthorized increase of the capital stock at the suit of an injured stockholder. (*Farmers & Traders' Bank v. National Laundry & Linen Supply Co.*, 788.)

Right to Inspect and to Take Copies of Records.

5. The refusal to permit a stockholder to appoint his own agent or attorney to examine the records of the corporation was in effect a denial of his right to examine such records. (*Pfirman v. Success Min. Co.*, 468.)

6. At common law the right to inspect the corporate records by a stockholder was a right incident to ownership. This right, however, was limited to cases where an inspection was sought at proper times and in good faith for the purpose of protecting the interests of the corporation or his own interests as stockholder. (*Pfirman v. Success Min. Co.*, 468.)

7. Under Rev. Codes, sections 2775, 2776 and 7122, the right of a stockholder to inspect and take copies of the records of a corporation is absolute. (*Pfirman v. Success Min. Co.*, 468.)

8. The right to make copies of the records of a corporation follows as an incident to the right to examine and inspect the same. (*Pfirman v. Success Min. Co.*, 468.)

Ratification of Unauthorized Acts.

9. Where a meeting of the board of directors of a private corporation was not lawful, for the reason that notice was not given to all of the directors as required by the by-laws, the failure of absent directors or the stockholders to dissent or take any action to set aside the action of the board of directors, under such circumstances, with knowledge of such action, amounts to a ratification thereof. (*Pettengill v. Blackman*, 241.)

10. Where a private corporation receives and retains the benefits of an unauthorized or illegal transaction, on the part of its board of directors, such conduct amounts to a ratification. (*Pettengill v. Blackman*, 241.)

Estoppel.

11. Where one acting as secretary, general manager and agent of a corporation dealing in land, with full authority to make conveyances on behalf of such corporation, induces a prospective purchaser to buy a tract of land which he represents as belonging to the corporation, when in fact it does not so belong, and on behalf

CORPORATIONS (Continued).

of the corporation gives the purchaser a deed for the land, and thereafter acquires title to the land himself, both he and his successors in interest are estopped from asserting title to the land as against such purchaser. (*Mountain Home Lumber Co. v. Swartwout*, 559.)

12. Where one without collusion or fraud deals with a corporation through an officer, who is in active management of the corporate business, if the act done by such officer is one which the corporation might do, such corporation will be estopped from relying upon any lack of authority on the part of such officer as a defense against the rights of the party so dealing with the corporation. (*Pettengill v. Blackman*, 241.)

13. G., as agent of a corporation, conveyed to S. land which he represented as belonging to the corporation, but which in fact did not so belong. Afterward G. acquired title for himself without the knowledge of S. *Held*, that such title as G. acquired became impressed with a trust for the benefit of S., and when G.'s supposed interest was subsequently purchased on execution sale by a judgment creditor of G., such purchaser took only such title and interest as G. had, and must also be deemed to have taken the legal title in trust for S., subject to every element of estoppel that could be urged against G. (*Mountain Home Lumber Co. v. Swartwout*, 559.)

When Bound by Contract.

14. Where a party deals with a corporation in good faith and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. (*Pettengill v. Blackman*, 241.)

Right to Prefer Creditors.

15. In the absence of collusion or fraud, an insolvent corporation is not prohibited from preferring certain creditors over others. (*Pettengill v. Blackburn*, 241.)

16. Where an insolvent corporation makes a *bona fide* transfer of property to a creditor as security for an actual indebtedness and for an adequate consideration, neither collusion nor fraud in its legal sense can be predicated on such transaction. (*Pettengill v. Blackman*, 241.)

Right to Plead Statute of Limitations.

17. An instruction to the effect that a foreign corporation, which has admittedly failed to comply with the statutes of this state in regard to designating an agent upon whom service of summons may

CORPORATIONS (Continued).

be had, is not entitled to urge the defense of the statute of limitations is not erroneous when the statute of limitations has been pleaded as a defense. (*Graham v. Brown Brothers Co.*, 651.)

COSTS.

1. Actions involving title to or possession of irrigating ditches are within the meaning of secs. 4901 and 4903, Rev. Codes, and the party in whose favor judgment is rendered is entitled to recover costs of suit. (*Brunzell v. Stevenson*, 202.)

2. Under rule 44 of the rules of practice in this court, damages may be allowed to respondent in an amount not to exceed twelve per cent of the judgment, where it manifestly appears the appeal has been taken for delay. (*Nelson v. McGoldrick Lumber Co.*, 451.)

COUNTIES.

1. The board of county commissioners has the power and authority to levy and collect taxes against all the taxable property within the county, including that within a highway district, for the payment of bonds, the proceeds whereof have been used for the construction of bridges within the county but without the boundaries of the district. (*Nampa Highway District v. County of Canyon*, 446.)

2. The provisions of sec. 16, chap. 55, Sess. Laws 1911, p. 129, held to not be applicable to the facts of this case. (*Nampa Highway District v. County of Canyon*, 446.)

COUNTY COMMISSIONERS.

See Schools and School Districts, 9-14.

COUNTY MUTUAL FIRE INSURANCE.

See Insurance, Schools and School Districts, 7.

CREDITORS, RIGHT TO PREFER.

See Corporations, 15.

CRIMINAL LAW.***Parties to Offenses.***

1. Persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid and abet in its commission, should be charged and tried as principals. (*State v. Curtis*, 537.)

Separate Trial of Codefendants.

2. Under section 7860, Rev. Codes, as amended by ch. 112, Sess. Laws 1911, p. 368, the granting or refusal of a separate trial rests in the sound discretion of the trial court. (*State v. Smith*, 337.)

CRIMINAL LAW (Continued).*Testimony of Accomplices.*

3. A conviction cannot be sustained on the uncorroborated testimony of an accomplice; but it is not necessary that the testimony of the accomplice be corroborated in every detail,—all that is required is, that there be corroborating evidence upon some material fact or circumstance, which, in itself, and without the aid of the testimony of the accomplice, tends to connect the accused with the commission of the offense. (State v. Smith, 337.)

4. The law clearly contemplates that some weight should be given to the testimony of an accomplice, and when the requirements of the law as to corroboration have been met, such testimony may become of the utmost importance in securing a just enforcement of the law. (State v. Smith, 337.)

Appeal and Error—In General.

5. Where counsel for accused, at the time of the giving of an instruction, states that it is satisfactory, he cannot on appeal from an adverse decision complain of the conduct of the trial court. (State v. Smith, 337.)

6. The giving of notice of appeal in the manner provided by sec. 8321, Rev. Codes, is necessary to the jurisdiction of the district court, but the failure to have affixed thereto the signature of the appellant or his attorney is a formal, rather than a jurisdictional, defect and may be waived. (State v. Leeper, 534.)

7. Failure to give a recognizance, as provided by sec. 8324, Rev. Codes, upon appeal to the district court does not defeat the jurisdiction of that court to hear the case, nor render the appeal subject to dismissal. (State v. Leeper, 534.)

Presumptions on Appeal.

8. All instructions given in a case must be read and considered together, and where, taken as a whole, they correctly state the law and are not inconsistent, but may be reasonably and fairly harmonized, it will be assumed that the jury gave due consideration to the whole charge and was not misled by an isolated portion, which, considered alone, does not fully and clearly state the law applicable to the facts in the case. (State v. Curtis, 537.)

Harmless Error.

9. Where accused is represented by counsel during the trial, and exercises the right to challenge jurors, the neglect of the trial court to inform him that if he intends to challenge an individual juror he must do so before the jury is sworn, will not be regarded as prejudicial error. (State v. Smith, 337.)

CRIMINAL LAW (Continued).

10. Instruction No. 11 examined and found not to be prejudicial to the appellant. (State v. Smith, 337.)

Reversal of Judgment.

11. Where there is sufficient evidence, if uncontradicted, to justify a conviction, a verdict and judgment based thereon will not be reversed because of conflict in the testimony. (State v. Curtis, 537.)

12. Where affidavits of newly discovered evidence are merely cumulative or corroborative of testimony introduced at the trial, the order of the court denying a motion for a new trial will not be reversed upon appeal. (State v. Curtis, 537.)

13. Where upon a criminal trial counsel for defendant objects to certain testimony offered on behalf of the state, with regard to the use of vile language, and counsel for the state promises to thereafter connect such testimony with the defendant, but fails to do so, and there is no evidence in the record which connects the defendant with the use of such language, such testimony being highly prejudicial to the defendant, it is reversible error to allow such testimony to go to the jury. (State v. Rogers, 259.)

14. The evidence in this case examined and *held* sufficient to sustain a conviction. (State v. Smith, 337.)

CROSSINGS.

See Railroads, 1-6.

DAMAGES.

1. Secs. 1217 and 1218, Rev. Codes, making it unlawful for an owner of sheep to herd them or permit them to graze within two miles of the dwelling-house of another, and providing as a penalty that the party injured may recover from such owner for damages sustained thereby, were enacted and are enforced in the exercise of the police power of the state. (Chandler v. Little, 119.)

2. Under the facts of this case the measure of damage is the loss respondent actually sustained as a direct result of appellant's sheep grazing off and destroying, within two miles of his dwelling-house, grass growing upon the public range which his stock would have fed upon had it not been so grazed off and destroyed. (Chandler v. Little, 119.)

3. In an action for damages for the conversion of personal property, the rule of damages to be applied in the absence of special circumstances is the market value of the property at the time of conversion, plus interest. (Averill Machinery Co. v. Vollmer-Clear-Water Co., 588.)

DAMAGES (Continued).

4. Where damage is not a direct but only a consequential result of an act, no cause of action arises until injury has been done or actual damage inflicted. (*Boise Development Co. v. Boise City*, 675.)

See Costs, 2; Malicious Prosecution, 8, 9.

DEATH.*Action for Causing.*

1. "All instructions given in a case must be read and considered together and where, taken as a whole, they correctly state the law and are not inconsistent, but may be reasonably and fairly harmonized, it will be assumed that the jury gave due consideration to the whole charge and was not misled by an isolated portion, which, considered alone, does not fully and clearly state the law applicable to the facts in the case." (*State v. Curtis*, 30 Ida. 537, 165 Pac. 999.) (*Kelly v. Lemhi Irrigation and Orchard Co.*, 778.)

2. A master is liable if an accident to a servant results from his failure to provide the servant with reasonably safe implements and appliances, even though there is also negligence of a fellow-servant, if the two concur as a proximate cause of the injury. (*Kelly v. Lemhi Irr. & Orchard Co.*, 778.)

3. In an action brought under sec. 4100, Rev. Codes, if it be shown that the heirs have suffered substantial injury through the loss of the companionship and society of the deceased, then such loss may be considered by the jury in estimating the damages. This is true even though the heirs, for whose benefit the action is brought, are not relatives in the direct line but collateral. The close relation and companionship are not implied from the mere fact of relationship, but must be shown by the evidence. (*Kelly v. Lemhi Irr. & Orchard Co.*, 778.)

DEED.

See Mortgage, 1, 2.

DEFAULT.

See Judgment.

DEFENSES.

See Municipal Corporations, 22.

DIRECTION OF VERDICT.

See Appeal and Error, 32.

DISMISSAL AND NONSUIT.

1. Where the evidence is so uncertain as to leave it equally clear and probable that the injury may have been caused by any one of several parties, and there is a total absence of proof that the injury was the result of the negligence or carelessness of the defendant then a verdict would be pure speculation and could not be sustained and it would be the duty of the trial court to grant a nonsuit. (*Hargis v. Paulsen*, 571.)

2. *Held*, that the trial court did not err in granting respondent's motion for a nonsuit, an examination of the record disclosing the fact that there was no evidence upon which a verdict for appellant could be sustained. (*Hargis v. Paulsen*, 571.)

DISMISSAL OF APPEAL.

See Appeal and Error, 19.

DITCH.

See Highways.

DIVORCE.

1. A motion for alimony and suit money in an action for divorce must be heard in the county or district in which the action is pending. (*Callahan v. Dunn*, 225.)

2. An order for alimony and suit money cannot be made in an original proceeding in this court instituted for the purpose of prohibiting a trial judge from exceeding his powers in a divorce action. (*Callahan v. Dunn*, 225.)

3. Service of notice of motion to amend and modify a decree of divorce need not be personal upon a party who has appeared in the action and has thereafter departed from, and resides out of, the state. (*Keller v. Keller*, 79.)

See Judgment, 9.

DRAINAGE DISTRICTS.

See Drains, 1-19.

DRAINS.

In General—Drainage Districts—Assessments.

1. The drainage districts provided for by the laws of this state are *quasi* corporations, being public in their nature and designed to accomplish purposes conducive to the general welfare. (*Burt v. Farmers' Co-operative Irrigation Co.*, 752.)

2. The methods of organizing drainage districts, their structure and the means and agencies by which they may accomplish their

DRAINS (Continued).

purpose are matters addressed solely to the legislative discretion, which discretion is not subject to review by the courts except to determine whether such legislation violates some constitutional inhibition. (*Burt v. Farmers' Co-operative Irr. Co.*, 752.)

3. Under the drainage law of 1913, prior to amendment, benefits were to be assessed upon the principles governing special assessments in local improvement districts and were required to bear some relation to the enhanced value of the tracts assessed. (*Burt v. Farmers' Co-operative Irr. Co.*, 752.)

4. The legislature of this state has power to provide that lands which by reason of artificial irrigation contribute by seepage and saturation to the swampy condition of low lands should contribute their just proportion of the cost of constructing works for the reclamation of such lower lands. (*Burt v. Farmers' Co-operative Irr. Co.*, 752.)

5. The common-law rule to the effect that one who diverts water from its natural course did so at his peril and became an insurer against any damage which might result from such action has been modified and relaxed in this state, so that negligence in constructing, maintaining or operating a ditch or canal must be shown as a basis for recovery of damages by persons injured. (*Burt v. Farmers' Co-operative Irr. Co.*, 752.)

6. It is within the legislative power of this state to restore the rule of the common law and render the person diverting water from its natural channel liable for any damages resulting from the escapement thereof. (*Burt v. Farmers' Co-operative Irr. Co.*, 752.)

7. So far as liability for injury caused by water diverted from its natural channel is concerned, no different principle exists between water flowing upon the surface of the soil and that seeping or percolating beneath its surface. (*Burt v. Farmers' Co-operative Irr. Co.*, 752.)

8. The legislature having power to provide for the levy of the assessment, the law in question must be upheld, even though in providing for the execution of the power it may have confused the principles upon which the assessment was to be based. (*Burt v. Farmers' Co-operative Irr. Co.*, 753.)

9. A law will be sustained if it can be done without doing violence to constitutional limitations, and at the same time give effect to the evident purpose of the enactment. (*Burt v. Farmers' Co-operative Irr. Co.*, 753.)

10. The law permitting high lands irrigated by artificial means, which are responsible in part for the swampy condition of lower lands, to be assessed for a portion of the cost of constructing the drainage works, is an exercise of that power whereby the legislature

DRAINS (Continued).

provides the means and methods by which one may so use his own property as not to injure that of another. (*Burt v. Farmers' Co-operative Irr. Co.*, 753.)

11. What lands may be included within a drainage district and what lands may not is a question of legislative discretion, and has to do with the structure of the organization which the legislature proposes to create for the accomplishment of the general welfare, and is a question entirely distinct from that of the power of the district after its formation to levy assessments and the constitutional limitations, if any, upon such power. (*Burt v. Farmers' Co-operative Irr. Co.*, 753.)

12. It is not a valid objection to the establishment of a drainage district that a minority in acreage of the lands within its boundaries may receive no special benefit, as that term is used in the drainage district laws of this state. (*Burt v. Farmers' Co-operative Irr. Co.*, 753.)

13. In determining whether a majority of the lands in acreage included in a drainage district will be specially benefited by the construction of the works, the judge may take into consideration the responsibility of the high lands to the low lands for seepage and saturation by irrigation water. (*Burt v. Farmers' Co-operative Irr. Co.*, 753.)

14. It was the intention of the legislature to provide, if, by reason of carrying irrigation water through canals, seepage water escapes from the rights of way thereof and contributes to the water-logged condition of the land in the proposed drainage district, that these rights of way should be assessed for their just proportion of the cost of constructing the drainage works the same as other high lands. (*Burt v. Farmers' Co-operative Irr. Co.*, 753.)

15. Under the plain language of the drainage district act, the assessments must be made against the tracts of land within the district and not against the person of the owner. (*Burt v. Farmers' Co-operative Irr. Co.*, 753.)

16. That portion of subdivision 5 of sec. 9 of the drainage district act of 1913 relating to assessments upon municipalities or corporations does not apply in the case at bar. The assessments therein referred to are not to be made as benefits to any tract of land, but are to be made upon the theory of public benefits for which it is proper that municipalities or corporations should be assessed, to be paid out of the general fund of such municipalities or corporations. (*Burt v. Farmers' Co-operative Irr. Co.*, 753.)

17. The enhanced value of low lands should be taken into consideration in finally determining the proportion of the cost which

DRAINS (Continued).

tracts of land in the district must contribute to the construction of drainage works. (*Burt v. Farmers' Co-operative Irr. Co.*, 754.)

Appeal.

18. An order of the district court declaring a proposed drainage district duly organized, under the provisions of section 4, chap. 16, Sess. Laws 1913, is not an appealable order under section 4800, Rev. Codes, since it is not a final order, and a further hearing upon the question in the district court is provided by the drainage act of 1913, which also provides for an appeal from the order of the court confirming the report of the commissioners, upon which appeal the question sought to be raised in this appeal might properly be raised. (*In re Organization of Drainage District No. 1 of Ada County*, 351.)

19. Held, that chap. 16, Sess. Laws 1913, and amendments thereto, providing for the establishment of drainage districts, does not provide for an appeal from an order of the district court declaring a district duly organized, after the first hearing upon the petition for such organization, and such preliminary order of the district court does not finally adjudicate any of the rights involved in proceedings under the provisions of said chapter. (*In re Organization of Drainage District No. 1 of Ada County*, 351.)

DYING DECLARATIONS.

See Homicide, 6.

ELECTION OF REMEDIES.

1. In order to apply the doctrine of election of remedies, the party sought to be barred must actually have had at his command more than one remedy. (*Boise Development Co. v. Boise City*, 675.)

2. When a party, acting upon a mistaken theory as to his legal rights, brings his action and is defeated by reason thereof, and afterward renews the litigation, basing his claim upon a correct theory, the former judgment is no bar to the second action. (*Boise Development Co. v. Boise City*, 675.)

ELECTIONS.

1. The findings of fact of the district court in contested election cases will not be set aside by the supreme court where there is a substantial conflict in the evidence and such findings are supported by competent evidence. (*Huffaker v. Edgington*, 179.)

2. The burden rests upon the party contesting an election to show that enough illegal votes were cast, or legal votes rejected, to change the result of the election, or that such serious wrong or fraud existed as to make the result of the election doubtful, in order to

ELECTIONS (Continued).

justify the court in setting aside the certificate of the canvassing board. (*Huffaker v. Edgington*, 179.)

3. Laws prescribing the duties of the election officers are directed primarily to such officers, and their failure to comply with such laws relative to registering voters who comply with the law so far as required of them should not be construed so as to defeat the right of citizens to vote, unless the failure to strictly comply with such laws makes the result of the election doubtful. (*Huffaker v. Edgington*, 179.)

EMINENT DOMAIN.

1. If a reasonable although not an absolute necessity exists to take private property for a public use, the power of eminent domain may be invoked. (*Marsh Mining Co. v. Inland Empire Mining & Milling Co.*, 1.)

2. Property devoted to or held for a public use is subject to the power of eminent domain if the right to so take it is given by constitutional provision or legislative enactment, in express terms or by clear implication, but it cannot be taken to be used in the same manner and for the same purpose to which it is already being applied or for which it is, in good faith, being held, if by so doing that purpose will be defeated. (*Marsh Min. Co. v. Inland Empire Min. & Milling Co.*, 1.)

3. The theory upon which the power of eminent domain is extended in aid of the mining industry is that public benefit will result from the application of private property to public use. It was not the intention of the framers of the constitution, nor of the legislature, that this power be so invoked that the mine will be developed and thereby another be destroyed, nor that one mine owner be enriched and another impoverished. The aid of eminent domain is extended to the industry, not to the individual. (*Marsh Min. Co. v. Inland Empire Min. & Milling Co.*, 1.)

4. Chapter 3, title 8, of the Civil Code points out the occasions when, the conditions under which and the methods and agencies whereby the use of mining property may be appropriated in aid of the mining industry and, the purposes for which it may be so appropriated having been specified, it follows that, unless it is being applied by its owner to or in good faith held for the same or a more necessary public use which will be defeated or seriously interfered with thereby, it may be taken in aid of that industry, under the power of eminent domain, for one or more of those designated purposes and none other. (*Marsh Min. Co. v. Inland Empire Min. & Milling Co.*, 1.)

EQUITABLE ESTOPPEL.

See Estoppel.

EQUITY.

1. Whenever one party has in his possession money which in equity and good conscience belongs to another, the law raises a promise upon the part of the first party to repay such money. (*Milner v. Pelham*, 594.)

ESTOPPEL.

1. An estoppel can never be invoked in aid of a contract which is expressly prohibited by a constitutional or statutory provision. (*School District No. 8 v. Twin Falls County Mutual Fire Ins. Co.*, 400.)

2. An appellate court can only derive its jurisdiction from the constitution and statutes of the state, and therefore, in the absence of actual fraud, there can be no estoppel to deny its jurisdiction. (*Athey v. Oregon Short Line R. R. Co.*, 318.)

3. The doctrine of estoppel cannot be invoked against a sovereign state. (*State v. Twin Falls Salmon River Land & Water Co.*, 75.)

4. The doctrine of equitable estoppel does not apply to the government when it is dealing or operating in its governmental capacity, but when it is operating in its proprietary capacity substantial considerations underlying the doctrine of equitable estoppel apply to the government as well as to individuals. (*State v. Twin Falls Salmon River Land & Water Co.*, 41.)

See *Corporations*, 11; *Husband and Wife*, 12; *Waters and Water-courses*, 24.

EVIDENCE.*In General.*

1. Neither the testimony of the clerk of the district court nor that of his deputy will be admissible to impeach the presumption of the regularity of their official acts; other evidence may be received for such purpose. (*Athey v. Oregon Short Line R. R. Co.*, 318.)

2. Mortality tables are merely an aid to the jury in determining life expectancy and are not conclusive. (*Cnkovch v. Success Min. Co.*, 623.)

Parol Evidence.

3. Parol testimony is incompetent to vary the terms of a written contract, but may be admitted to explain a latent ambiguity. (*Green v. Consolidated Wagon & Machine Co.*, 359.)

4. Parol evidence is admissible for the purpose of showing that, by reason of mistake, a written instrument does not truly express the intention of the parties. A mistake of the scrivener whereby

EVIDENCE (Continued).

he fails to express the agreement of the parties may be corrected. (*Bowers v. Bennett*, 188.)

5. The apparent purport of a written instrument may be varied by parol evidence when such instrument is vague or indefinite in its terms, or the terms contain a meaning which is not properly expressed but which was intended by the parties to be a part of the contract or transaction and binding upon them. (*Johansen v. Looney*, 123.)

EXCEPTIONS, BILL OF.*Settlement of, by Supreme Court.*

1. Where a petition has been presented to this court asking that a reporter's transcript be settled as a bill of exceptions and the reporter's transcript does not accompany the petition, there is nothing before this court upon which it can act. (*Hansen v. Boise Payette Lumber Co.*, 801.)

2. Under the statutes of this state the supreme court has no power to settle an entire bill of exceptions, but its power is restricted to those cases where the trial court failed to allow an exception and not where the court refused to settle the transcript as a whole. (*Hansen v. Boise Payette Lumber Co.*, 801.)

EXECUTION.*Claim by Third Person.*

1. Under the provisions of sec. 4478, Rev. Codes, as amended by the Sess. Laws 1913, p. 308, where property levied on by a constable is claimed by a stranger to the writ, the officer is not bound to proceed further with the execution of his writ; but when he has demanded and accepted indemnity, he is bound to proceed and rely on his bond in indemnity. (*Smith v. Graham*, 132.)

Sale—Bona Fide Purchaser.

2. A purchaser at an execution sale of realty, who takes the property with actual notice that the judgment debtor had given both a bond for a deed and a deed for the property to a third party before the lien of the judgment attached, is not a *bona fide* purchaser. (*Mountain Home Lumber Co. v. Swartwout*, 559.)

3. One who parts with a consideration neither valuable nor irrevocable is not a *bona fide* purchaser. (*Mountain Home Lumber Co. v. Swartwout*, 559.)

4. A purchaser at an execution sale of realty who takes the property with constructive notice that a judgment prior to the one under which he purchases had impressed such property with a prior lien, is not a *bona fide* purchaser. (*Mountain Home Lumber Co. v. Swartwout*, 559.)

EXECUTION (Continued).

— *Rights of Purchaser.*

5. Sec. 3170, Rev. Codes, provides that "every transfer of personal property other than a thing in action, and every lien thereon, other than a mortgage when allowed by law, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession. . . . Held, that where A purchases, at an execution sale, hogs belonging to B, and sold thereat in partial satisfaction of a judgment against him, and he leaves them in B's possession paying him to care for them, sec. 3170 does not apply, and B's judgment creditors obtain no rights against A in respect to the hogs by reason of his failure to remove them from B's possession. (*Sweeten v. Ezell*, 154.)

6. Where real estate was levied upon and attached pursuant to a writ of attachment issued out of the probate court, and judgment was rendered in favor of the attaching creditor and an abstract thereof filed with the clerk of the district court, and thereafter the land was purchased at a sale in execution of such judgment, the interest of the purchaser is prior to a lien obtained by reason of an attachment levied upon the land which was issued out of the district court after the issuance of the writ out of the probate court, but before the rendition of the judgment and the filing of the abstract thereof. (*Hanson v. Morrison*, 422.)

7. Where a judgment creditor bids in property of the judgment debtor, at an execution sale, and credits upon the judgment the amount bid, no valuable consideration passes for such purchase, since it amounts to nothing more than a cancelation, *pro tanto*, of a pre-existing indebtedness, and such purchase conveys only the legal title to the judgment creditor, subject to existing equities. (*Mountain Home Lumber Co. v. Swartwout*, 559.)

Actions.

8. Where it appears that the only question properly at issue in an action was as to whether or not the defendant had performed his statutory duty as constable in proceeding to levy upon sufficient property of the judgment debtor to satisfy the judgment, and that the question of the solvency of the judgment debtor was therefore immaterial, an instruction by the trial court upon the latter question is error. (*Smith v. Graham*, 132.)

9. Held, that the question of the exemption of the property levied upon is not involved in this case, as it appears that the judgment debtor made no claim of exemption, and the court accordingly erred

EXECUTION (Continued).

in instructing the jury upon the question of exemption. (Smith v. Graham, 132.)

EXEMPTION.

See Execution, 9.

EXPERTS.

See Witnesses, 1.

FENCES.

See Railroads, 7.

FINDINGS.

See Appeal and Error, 36.

FIRE INSURANCE.

See Insurance, 2; Schools and School Districts, 7.

FORECLOSURE OF MORTGAGES.

See Limitation of Actions, 1-4.

FRAUD.

1. In an action based upon fraudulent representations it must be shown, among other things, that the party making them knew them to be false or that he made them recklessly without knowledge of their truth or falsity. (Johnson v. Holderman, 691.)

2. A representation believed on reasonable grounds, by the party making it, to be true, is not fraudulent. (Johnson v. Holderman, 691.)

3. In order to establish fraud in a case of this kind it must be shown in addition to falsity of representations of a material fact, or facts, upon which the party to whom they were made innocently acted to his injury, that the party making them knew them to be false or that he made them recklessly, without knowledge of their truth or falsity. (Parker v. Herron, 327.)

4. The evidence in this case examined and held to be insufficient to sustain the allegations of the answer wherein fraud is charged. (Parker v. Herron, 327.)

See Principal and Agent, 2-4.

FRAUDS, STATUTE OF.

1. In order to render an oral contract falling within the scope of the statute of frauds enforceable by action, the memorandum thereof

FRAUDS, STATUTE OF (Continued).

must state the contract with such certainty that its essentials can be known from the memorandum itself, or by a reference contained in it to some other writing, without recourse to parol proof to supply them. (*Blumauer-Frank Drug Co. v. Young*, 501.)

GATES.

See Railroads, 7.

GRANT.

See Public Lands, 1-4.

GUARDIAN AND WARD.***Benevolent or Charitable Organisation as Guardian — Termination of Guardianship.***

1. When a benevolent or charitable corporation is made the guardian of a child by order of the probate court under the provisions of an act of the 10th session, approved March 6, 1909, Sess. Laws 1909, p. 38, the probate court has the same control over such corporation as guardian as over any other guardian. Such guardianship may be terminated by said court in the same manner in which any other guardianship may be terminated. (*Jain v. Priest*, 273.)

2. That certain order made by the probate court for Shoshone county in this case on October 2, 1915, has the force and effect of an order terminating the guardianship of the Idaho Children's Home Finding and Aid Society. Under the facts of this case the society had sufficient notice of the proceedings to be bound by such order. (*Jain v. Priest*, 273.)

3. Such benevolent or charitable corporation, as guardian of minor children, has no authority to consent to their adoption when the children are not surrendered to it by the parents, but are committed to it as guardian by the probate court in a proceeding by which they are taken from the parents without their consent. (*Jain v. Priest*, 273.)

4. That certain order of the probate court of Shoshone county in this case made on October 2, 1915, by which the children of appellants were removed from their custody and committed to the custody of the Idaho Children's Home Finding and Aid Society, as guardian, does not permanently and absolutely deprive the parents of the custody of their children, and is not such a final and unconditional judgment as dispenses with the necessity of the consent of the parents to adoption proceedings. (*Jain v. Priest*, 273.)

5. While such corporation may voluntarily resign the guardianship or apply to the court for permission to surrender the children

GUARDIAN AND WARD (Continued).

to the parents, the ultimate decision as to whether the guardianship shall be terminated or the children surrendered to the parents is with the probate court in each case. (Jain v. Priest, 273.)

6. Whenever it appears to the probate court on application of the ward or otherwise that the guardianship is no longer necessary, it may be terminated. Reasonable notice of the proceedings and termination of the guardianship should be given the guardian. (Jain v. Priest, 273.)

HABEAS CORPUS.

1. The judgment of a district court in a *habeas corpus* proceeding, involving the custody of a child, is appealable. (Jain v. Priest, 273.)

2. The supreme court is authorized to make a writ of *habeas corpus* issued by it returnable before any district court. (Jain v. Priest, 273.)

3. Under the provisions of sec. 8354, Rev. Codes, upon petition for a writ of *habeas corpus* this court may examine the evidence upon which the order of commitment was based to determine whether or not there was probable cause to believe, first, that the crime charged has been committed; second, that the party held to answer has committed it. (In re Baugh, 387.)

HIGHWAY DISTRICTS.

See Counties, 1.

HIGHWAYS.

1. Power to establish highways is vested, inherently, in the legislature, and in order for a board of county commissioners to accept, on behalf of the state, the grant of right of way over the public domain expressed in sec. 2477, Rev. Stats. U. S., or to lay out a road across private property, it must substantially conform to the state law delegating this power to it and prescribing the manner in which it may be exercised. A mere order, made and entered of record by the board, declaring certain section lines to be public highways, is not a substantial compliance with the law. (Gooding Highway District v. Idaho Irrigation Co., 232.)

2. The owner of a ditch or canal constructed across an established highway must provide a bridge, at the point of intersection, for the use and benefit of the public, but if the ditch or canal is constructed prior to the establishment of the road which intersects it, the expense of building the bridge must be borne by the county or highway district to which the road belongs. (Gooding Highway District v. Idaho Irr. Co., 232.)

HOMESTEAD.

1. *Held*, that under sec. 3106, Rev. Codes, providing that "No estate in the homestead of a married person, or in any part of the community property occupied as a residence by a married person can be conveyed or encumbered by act of the party, unless both husband and wife join in the execution of the instrument by which it is so conveyed or encumbered, and it be acknowledged by the wife as provided in Chapter 3 of this Title," an instrument purporting to convey or encumber such property or any interest therein, in which the wife does not join, is void. (*Hughes v. Latour Creek R. R. Co.*, 475.)

HOMICIDE.

Information Charging Murder.

1. An information, the charging part of which is in the following language, to wit, that the defendant "did then and there wilfully, unlawfully, feloniously, and with malice aforethought, kill and murder one Evangelos Pappas, a human being," is sufficient to charge the crime of murder. (*State v. Lundhigh*, 365.)

2. *Held*, that the language of the information in this case is sufficient to charge the crime of which the defendant was convicted in the court below. (*State v. Rogers*, 259.)

Evidence.

3. In a trial for homicide the defendant is not required to establish circumstances in mitigation or that justify or excuse his act, either beyond a reasonable doubt or by a preponderance of the evidence, but is only bound to prove such circumstances as any fact is to be proven, and if the proof on the whole creates a reasonable doubt of the defendant's guilt, he is entitled to an acquittal. (*State v. Rogers*, 259.)

4. Upon a trial for murder, where the state has proved beyond a reasonable doubt the commission of a homicide by the defendant, if the commission of the homicide is admitted by the defendant, the burden of proving the circumstances in mitigation of, or that justify or excuse it, devolves upon him, unless the proof in the case tends to show that the crime only amounted to manslaughter or that the defendant was justifiable or excusable; but he is not required to establish such circumstances by a preponderance of the evidence, but only to such extent that the jury, after considering the whole evidence in the case, have a reasonable doubt as to his guilt. (*State v. Lundhigh*, 365.)

5. In order to make an alleged threat of the defendant against the deceased admissible, it must appear from circumstances in evidence, with a reasonable degree of certainty, that the defendant

HOMICIDE (Continued).

directed the threat in question against the deceased before it can be admitted in evidence against him, and if the circumstances in proof leave this matter in doubt, that doubt must be resolved in favor of the defendant and the threat excluded. (*State v. Rogers*, 259.)

6. *Held*, that the dying declaration of the deceased in this case was properly admitted in evidence. (*State v. Lundhigh*, 365.)

Erroneous Instructions.

7. That portion of an instruction in a trial for homicide which reads: "Malice includes not only anger, hatred and revenge, but every other unlawful and unjustifiable motive," is erroneous, as it tends to lead the jury to believe that they would be justified in finding that an act was done with malice if done in anger. Whereas a killing done in anger might amount only to manslaughter. (*State v. Rogers*, 259.)

8. An instruction to the jury based upon sec. 7866, Rev. Codes, to the effect that if the state has proved beyond a reasonable doubt that the defendant shot and killed the deceased, and the plea of self-defense is interposed by defendant, it is incumbent upon him to establish and prove such defense by a preponderance of the evidence, is erroneous. (*State v. Lundhigh*, 365.)

9. An instruction of the court given at the request of the state contained the following: "The jury are not to accept the evidence of the accused blindly or any further than it is corroborated by other evidence, but may consider whether it is true and given in good faith, or merely to prevent a conviction. And in considering the testimony of defendant Lundhigh, you have a right to take into account any interest he may have in the result of your verdict, as bearing upon the question of his credibility as a witness in his own behalf." *Held*, that the giving of such an instruction is error. (*State v. Lundhigh*, 365.)

10. In this case the court gave the following instruction: "The court instructs you, as a matter of law, that when the defendant testified as a witness in this case, he became as any other witness and his credibility is to be tested by, and subject to the same tests as are legally applied to any other witness; and in determining the degree of credibility that shall be accorded his testimony, the jury have a right to take into consideration the fact that he is interested in the result of the trial, as well as his demeanor and conduct upon the witness-stand, and during the trial, and whether or not he has been contradicted or corroborated by other witnesses or circumstances." This instruction is erroneous, in that it singles out the defendant as a witness and calls the attention of the jury particularly to the matter of his credibility. Instructions as to the credi-

HOMICIDE (Continued).

bility of witnesses should be general, and apply to all of the witnesses for the state and the defendant. (*State v. Rogers*, 259.)

11. The giving of the following instruction in a trial for homicide: "That if you believe, beyond a reasonable doubt, that the deceased was engaged in assaulting the defendant, then you may take into consideration the relative size and strength of deceased and the defendant," places the burden upon the defendant, which is without warrant in law, because it requires him to establish some element of his defense beyond a reasonable doubt. (*State v. Rogers*, 259.)

— *Misleading Instruction.*

12. In an instruction in a trial for homicide wherein the court seeks to define the difference between the first and second degrees of murder, and uses the following language: "But while the purpose, the intent and its execution may follow thus rapidly upon each other, it is proper for the jury to take into consideration the shortness of such interval in considering whether such sudden and speedy execution may not be attributed to sudden passion and anger, rather than to deliberation and premeditation, which must characterize the higher offense," the giving of such instruction is misleading and erroneous, when read in connection with instruction No. 8 defining malice, in that it purports to include in the definition of murder in the second degree elements which tend to constitute only manslaughter. (*State v. Rogers*, 259.)

Charges Deemed Excepted to.

13. Under sec. 7946, Rev. Codes, written charges presented and requested by either the state or defendant are deemed excepted to, and this court may examine such charges whether assigned as error in the brief of appellant or not. (*State v. Lundhigh*, 365.)

HUSBAND AND WIFE.

Married Woman's Contract.

1. In this state the common-law disability of married women to enter into contracts still remains except when the same has been removed by legislative grants of power. (*Meier & Frank Co. v. Bruce*, 732.)

2. The disability of married women to enter into contracts has not been removed in this state, except where the married woman contracts for her own use or benefit or in reference to the management and control or for the use and benefit of her separate property. (*Meier & Frank Co. v. Bruce*, 732.)

3. The common-law disability of married women to contract in the state of Oregon has been entirely removed. (*First Nat. Bank*

HUSBAND AND WIFE (Continued).

v. Leonard, 36 Or. 390, 59 Pac. 873.) (*Meier & Frank Co. v. Bruce*, 732.)

4. A contract entered into by a married woman in the state of Oregon, while there domiciled and to be performed therein, is a valid contract, and must be enforced by the courts of this state. (*Meier & Frank Co. v. Bruce*, 732.)

Wife's Separate Property.

5. B. and his wife while living in Montana made an agreement that the wife's earnings should be her separate property. These earnings she invested in cattle and horses, which were sold, B. retaining part of the proceeds of the sale and giving his wife his promissory note therefor, which was always treated by the parties as the wife's separate property. Afterward they moved to Idaho, and B. borrowed money of two different banks with which to buy a lot and build a house, giving his notes therefor. Subsequently he deeded this realty to his wife in payment of his note to her, the amount of which was substantially the value of the property. Some time thereafter the bank notes were reduced to a judgment, the lot attached and sold on execution to P. B.'s wife sued to quiet title. *Held*, under the facts stated, that the note from B. to his wife was her separate property, making a *bona fide* creditor of her husband, subject to preference the same as any other creditor. (*Bates v. Papesh*, 529.)

6. There is nothing wicked or immoral or contrary to public policy in permitting a wife's separate property to become liable for the payment of her husband's debts or community debts; nor is there anything in the statutes to indicate that the public policy of the state would be violated by enforcing a valid contract made by a married woman in a sister state. (*Meier & Frank Co. v. Bruce*, 732.)

Bona Fide Transfer.

7. A wife, who loans the proceeds of her separate property to her husband, becomes one of his creditors, and her rights as such are governed by the same legal principles as the rights of any other creditor. (*Bates v. Papesh*, 529.)

8. Whenever there is a true debt and a real transfer for an adequate consideration, there is no collusion, and fraud in its legal sense cannot be predicated thereon, even though the transfer result in a preference; nor does the fact that the creditor obtaining the preference is the debtor's wife operate to change or modify the rule. (*Bates v. Papesh*, 529.)

Suit by Wife to Quiet Title.

9. In a suit by a wife to quiet title to real estate, sold on execution against her husband, evidence *held* sufficient to support the

HUSBAND AND WIFE (Continued).

finding that the property was purchased with the separate funds of the wife and not with the proceeds of a sale of community property. (McKeehan v. Vollmer-Clearwater Co., 505.)

10. Where there is a conflict of evidence as to whether property claimed as separate property of the wife was purchased out of the proceeds of the sale of community property, and the trial court finds that it was not so purchased, the finding will not be disturbed. (McKeehan v. Vollmer-Clearwater Co., 505.)

11. A married woman purchased real property with her own funds, allowing her husband to act as her agent in the transaction and the title was taken in the name of her husband contrary to her instructions. The wife, being unable to read, believed her husband's statement that the title was in her name, and nothing happened to put her on inquiry or arouse her suspicions to the contrary. (McKeehan v. Vollmer-Clearwater Co., 505.)

12. *Held*, that she was not estopped to claim title as against an execution creditor of her husband. (McKeehan v. Vollmer-Clearwater Co., 505.)

ILLEGAL FEES.

See Officers.

ILLEGALITY.

See Contract, 1.

INFORMATION.

See Homicide; Officers.

INJUNCTION.

1. An injunction will not issue unless it appears that the party against whom the relief is sought is violating, or will or threatens to violate, some right of the party seeking the remedy. (Brunzell v. Stevenson, 202.)

INSOLVENT CORPORATIONS.

See Corporations, 15.

INSPECTION OF RECORDS.

See Corporations, 5.

INSTRUCTIONS.

See Appeal and Error, 29; Contracts, 14; Homicide; Master and Servant.

INSURANCE.

1. Where R., desiring life insurance, applied in writing to the insurance company for such insurance, and agreed that the policy of insurance applied for should not take effect unless the first premium was paid and the policy was delivered to and received by him during his lifetime and while he was in good health, and after applying for the policy and before the delivery thereof R. was stricken with appendicitis, from which he died five days after he received the policy, said policy having been sent to him by mail from the insurance company's branch office in Spokane, Washington, in total ignorance of the changed condition of R.'s health, and R.'s friends thereafter paid the first premium, which the company promptly returned when it discovered the fact of R.'s fatal illness, *held*, that the policy did not take effect by reason of the fact that R. was not in good health at the time it was received by him. (*Rathbun v. New York Life Ins. Co.*, 34.)

2. A county mutual fire insurance company cannot accept a member whose liability may be limited. (*School District No. 8 v. Twin Falls County Mutual Fire Ins. Co.*, 400.)

INTOXICATING LIQUORS.

1. Section 25, S. B. No. 62, Sess. Laws 1909, p. 17, makes the transportation of intoxicating liquors into a prohibition district, or into any point or place in this state where the sale of intoxicating liquors is prohibited by law, a misdemeanor. (*State v. Cummins*, 411.)

2. This section does not contravene the provisions of the 5th or 14th amendments to the constitution of the United States nor the provisions of section 1, art. 1, of the constitution of the state of Idaho. (*State v. Cummins*, 411.)

3. An act prohibiting the transportation of intoxicating liquors into territory where the sale thereof is prohibited by law is a valid exercise of the police power. (*State v. Cummins*, 411.)

4. Where the evidence taken at the preliminary hearing of one accused of having intoxicating liquor in his possession, contrary to law, shows that the accused owned a drug-store and building in which the same was situated, and that during his temporary absence therefrom certain parties entered the store with a satchel containing intoxicating liquor, that the sheriff entered immediately afterward and confiscated and removed the liquor, and there is no evidence showing that it was brought upon the premises with the knowledge or consent of the accused, there was not probable cause for holding him to answer. (*In re Baugh*, 387.)

IRRIGATION DISTRICTS.

See Waters and Watercourses, 28.

JUDGMENT.***Limitation upon Judgment.***

1. Judgment must be limited to the relief demanded, or to such as is embraced within the issues. (*Brunzell v. Stevenson*, 202.)

Entry of Default.

2. When a defendant has a pleading on file which tenders an issue of law or fact, although filed out of time, but before motion for default, and when he is in court and ready for trial, it is error to enter a default against him and to order that it become absolute unless he pay to plaintiff a sum of money by way of terms. (*Kerney v. Hatfield*, 90, 97.)

Entry of Judgment.

3. It is the statutory duty of the clerk of the district court to enter the judgment in the judgment-book and make up the judgment-roll prior to making the entries in the judgment docket, and when it appears that the entries in the judgment docket have been made a *prima facie* presumption arises that the clerk has done his duty and that the judgment has actually been entered in the judgment-book. (*Athey v. Oregon Short Line R. R. Co.*, 318.)

4. The memorandum in the judgment docket of the date of the entry of judgment being the only record thereof provided by law, and the judgment docket entries not being properly part of the record on appeal, there is no authentic evidence of the date of entry of judgment in the record. (*Athey v. Oregon Short Line R. R. Co.*, 318.)

5. Any memorandum of the date of entry of judgment made by the clerk of the district court without authority of law has no standing as evidence of the date of entry of judgment. (*Athey v. Oregon Short Line R. R. Co.*, 318.)

Vacating Defaults.

6. Trial courts have the power to vacate defaults, and an order extending the time to plead, entered after the entry of a default, operates *ipso facto* to vacate the default. (*Vincent v. Black*, 636.)

7. Where it clearly appears that a default was permitted to be entered through the carelessness and negligence of a party, or his counsel, for which no reasonable excuse is offered, it will not be vacated upon the theory that it was taken against him through his mistake, inadvertence, surprise or excusable neglect. (*Nelson v. McGoldrick Lumber Co.*, 451.)

Vacating Default Judgment.

8. A default judgment entered while a cause is at issue is void, and may be set aside by the trial court. (*Vincent v. Black*, 636.)

JUDGMENT (Continued).*Vacating Void Judgment of Divorce.*

9. A void judgment in a divorce action may be set aside, even after the death of one of the parties, when the property interests of the survivor are involved in the proceeding. (*Vincent v. Black*, 636.)

See Appeal and Error, 36.

JURY.*Right to Trial by.*

1. In determining the question of whether or not parties are entitled to a trial by jury, courts must look to the ultimate and entire relief sought, and where, in order for the court to render a judgment which would give adequate relief it would be necessary to decree the cancelation of a mortgage and the surrender of a note, such relief could only be available by the exercise of the equitable jurisdiction of the court, and the parties would not be entitled to a jury trial. (*Rees v. Gorham*, 207.)

2. *Held*, that the allegations and prayer of plaintiff's complaint in this case show him to be entitled to a trial by jury, under sec. 7, art. 1, of the constitution, and secs. 4368 and 4369, Rev. Codes, which right cannot be denied him in the absence of a waiver. (*Johansen v. Looney*, 123.)

3. *Held*, that the acts and conduct of plaintiff in this case, as shown by the record, do not constitute a waiver of a jury trial. (*Johansen v. Looney*, 123.)

LIBEL.

1. In determining whether particular words are actionable *per se*, the same rule does not apply to libel as to slander. (*Dwyer v. Libert*, 576.)

2. A written communication of a character conducive to blacken the reputation of the person referred to, or excite ridicule or wrath against him, or destroy public confidence in him, is actionable without proof of special damage. (*Dwyer v. Libert*, 576.)

3. A written publication charging one with wilful falsehood in the matter of a serious business transaction must necessarily expose him to contempt and lower him in the common estimation of citizens, and is therefore actionable *per se*. (*Dwyer v. Libert*, 576.)

4. A complaint against a public officer filed with a body having a right to discharge him is conditionally privileged upon good faith and the absence of malice. (*Dwyer v. Libert*, 576.)

5. Where a complaint has been made against D., a public officer, who thereupon requests that the complaint be filed in writing, in

LIBEL (Continued).

order that he may be heard thereon, a privilege is created in the plaintiff conditioned upon good faith and the absence of malice. (Dwyer v. Libert, 576.)

6. The question of good faith and malice is one for the jury. (Dwyer v. Libert, 576.)

7. Where the general allegations of a complaint are sufficient to show that the wrong complained of was inflicted with malice or oppression or like circumstances, the complaint will be sufficient to authorize the infliction of exemplary damages. (Dwyer v. Libert, 576.)

8. Where under the pleadings of a case exemplary damages may be allowed, the pecuniary ability of the defendant is a proper matter for the consideration of the jury. (Dwyer v. Libert, 576.)

LIENS.

See Chattel Mortgages, 3.

LIFE INSURANCE.

See Insurance, 1.

LIMITATION OF ACTIONS.

1. A cause of action for fraud and misrepresentation is barred in three years from the discovery thereof. (Williams v. Shrope, 746.)

2. A knowledge of such facts as would put a reasonably prudent person upon inquiry is equivalent to a knowledge of the fraud and will start the running of the statute. (Williams v. Shrope, 746.)

3. Subd. 2, sec. 4054, Rev. Codes, limiting the time within which an action may be brought for trespass upon real property, has no application to an action on the case for consequential damages. (Boise Development Co. v. Boise City, 675.)

4. Actions on the case are governed by the provisions of sec. 4060, Rev. Codes, that: "An action for relief not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued." (Boise Development Co. v. Boise City, 675.)

See Corporations, 17.

LOGS AND LOGGING.

1. The question of the number of logs delivered under an oral contract is a question of fact for the jury to determine under all of the facts and circumstances in evidence. (Anderson v. Council Lumber Co., 464.)

2. *Held*, that the jury were justified under the evidence in this case in finding that respondent substantially complied with his part of the contract. (Anderson v. Council Lumber Co., 464.)

LOGS AND LOGGING (Continued).

3. A party who has failed to perform in full his part of a contract to deliver logs may recover compensation for the logs actually delivered according to the contract price, less damages, if any, occasioned by his failure to fully complete the contract. (*Anderson v. Council Lumber Co.*, 464.)

MALICIOUS PROSECUTION.***Right to Maintain Action.***

1. An action for damages for malicious prosecution cannot be maintained where it appears that the criminal case, which forms its basis, was terminated by dismissal, without hearing, by procurement of the party prosecuted, or as the result of a compromise. (*Campbell v. Bank and Trust Co.*, 552.)

2. *Held*, under the facts of this case, that as it affirmatively appears from the record, and from respondent's own testimony, that he was guilty of a criminal offense against the laws of the state, but through inadvertence was charged under the wrong statute without any fault on the part of Neitzel, he cannot be permitted to maintain this action for malicious prosecution. (*Nettleton v. Cook*, 82.)

Probable Cause.

3. In an action for malicious prosecution, probable cause, as a basis for instituting the prosecution complained of, is the existence of such facts or circumstances as would excite the belief in a reasonable person, acting on the facts within the knowledge of the prosecutor, that the one charged was guilty of the crime for which he was prosecuted. (*Nettleton v. Cook*, 82.)

Criminal Prosecutions.

4. The fact that the testimony taken at the preliminary examination was not written by a reporter does not render the proceeding void or the order discharging the accused of no avail as a determination in his favor of the criminal action. (*Ross v. Kerr*, 492.)

Advice of Counsel.

5. To justify by advice of counsel defendant must show that he truly, correctly, fully, fairly and in good faith stated to such counsel all the facts within his knowledge, or which he might, with reasonable diligence, have ascertained, bearing upon the guilt or innocence of the accused. (*Ross v. Kerr*, 492.)

Malice, Evidence of.

6. In an action for malicious prosecution, the fact that the plaintiff was not charged in the prosecution complained of under the proper statute with the commission of a criminal offense, is not

MALICIOUS PROSECUTION (Continued).

evidence of bad faith or malice on the part of the prosecutor, if the latter had reason to believe the accused guilty of a crime, and such belief was based either upon personal knowledge or information received from others, upon which he relied in good faith, and such facts had been communicated to the county attorney. (*Nettleton v. Cook*, 82.)

7. Malice must be shown to have existed before a recovery may be had by reason of a malicious prosecution, but malice, as a fact, may be inferred by the jury from the absence of probable cause. In order to recover punitive damages, however, actual malice in preferring the charge must be shown to have existed. This is done by showing that the person who preferred the charge was actuated by ill will or a desire to injure the accused. (*Ross v. Kerr*, 492.)

Damages.

8. To entitle a party to recover damages by reason of malicious prosecution, it must appear that the person who preferred the criminal charge acted without probable cause to believe the accused guilty of the crime charged, that he acted with malice and that the criminal action was terminated in favor of accused. (*Ross v. Kerr*, 492.)

9. Where plaintiff in an action for malicious prosecution shows that he was discharged by the committing magistrate after the holding of a preliminary examination, such discharge is *prima facie* evidence of want of probable cause but is not conclusive; and if it appears affirmatively from evidence introduced upon the trial that he was in fact guilty of an indictable misdemeanor, although not the one for which he was attempted to be held for trial, but of an indictable misdemeanor which was so closely akin thereto that the county attorney in drafting the criminal complaint inadvertently charged the defendant under the wrong section of the statute, want of probable cause is thereby rebutted, and the prosecutor cannot be held in damages. (*Nettleton v. Cook*, 82.)

Questions of Law and of Fact.

10. The existence of facts showing probable cause is for the jury to determine; whether or not the facts, found by the jury to exist, constitute probable cause is a question for the court. (*Ross v. Kerr*, 492.)

MANDAMUS.**Preliminary Demand or Request, and Refusal.**

1. It is an imperative rule that before making an application for a writ of mandate, an express demand or request must be made on the defendant to perform the act sought to be enforced by the writ. (*Pfirman v. Success Min. Co.*, 468.)

MANDAMUS (Continued).

2. The facts of this case examined, and held sufficient to sustain the findings of the lower court to the effect that there was a demand and a refusal. (*Pfirman v. Success Min. Co.*, 468.)

When Writ of Mandate may be Employed.

3. The writ of mandate may be employed to require a court to enter a judgment in the exercise of its jurisdiction, but not to control its discretion or direct its decision. (*Saint Michael's Monastery v. Steele*, 609.)

4. A writ of mandate will not issue where the party seeking it has a plain, speedy and adequate remedy at law. (*Lamberton v. McCarthy*, 707.)

5. A party considering himself aggrieved by the final judgment of a district court has his plain, speedy and adequate remedy at law by appeal to this court, and where there is such remedy, the writ of mandate is not available. (*Saint Michael's Monastery v. Steele*, 609.)

Subjects of Relief.

6. A writ of mandate will not issue from this court to compel a Carey Act construction company to issue shares of stock to a purchaser of state school land where the shares of stock already sold are far in excess of the available water supply and the contract entered into between the construction company and the state of Idaho was entered into under a mutual mistake of a material fact. (*State v. Twin Falls etc. Water Co.*, 75.)

7. Where a purchaser of school lands under a Carey Act project could not possibly obtain the amount of water his contract would entitle him to receive, and the issuance of shares of stock to the said purchaser would in effect defeat the rights of prior settlers to the water to which they are entitled under their contracts, a writ of mandate will not issue to compel the construction and canal company to sell shares of stock to said purchaser of school land. (*State v. Twin Falls Salmon River Land & Water Co.*, 75.)

8. Under chap. 141, 1913 Sess. Laws, p. 502, it is made the duty of the Secretary of State to publish or cause to be published in book form a sufficient number of books containing all the laws, resolutions and memorials passed by each session of the legislature of the state of Idaho. *Held*, that where a law is properly certified by the presiding officers of the two Houses of the legislature, and is approved and signed by the Governor and lodged in the office of the Secretary of State, such officer cannot be required by writ of mandate to make any alteration or insert any amendment in the law so certified and approved. (*Katerndahl v. Daugherty*, 356.)

See Municipal Corporations; Waters and Watercourses, 8.

MARRIED WOMEN'S CONTRACTS.

See Husband and Wife, 1-4.

MASTER AND SERVANT.***Safe Place to Work.***

1. Where a miner, working under the directions of a shift boss, is charged with the duty of picking down and removing all dangerous ground around his place of work and he has no means or opportunity to examine any other portion of the stope in which he is working beyond or above his immediate vicinity, he has a right to assume that his employer has inspected or examined that portion of the place not obvious or known to the servant and found it in a reasonably safe condition. (Cnkovch v. Success Min. Co., 623.)

2. Where, in an action by a miner injured by falling rock, plaintiff did not plead any assurance of safety by his employer, but defendant pleaded that plaintiff was thoroughly familiar with his place of work and with every danger, risk and hazard there present, it was not error to permit plaintiff to testify that defendant's shift boss told him that the ground above him was all right. (Cnkovch v. Success Min. Co., 623.)

Instructions.

3. Where the jury is fully instructed on the question of assumption of risk, the fact that other instructions advise the jury that contributory negligence will be a bar to recovery but fail to state that assumption of risk will also be a bar, is not prejudicial. (Cnkovch v. Success Min. Co., 623.)

4. The jury was instructed that "an employee has a right to assume, in the absence of apparent defects, that a place in which he is ordered to work by a shift boss is safe, and he is not bound to inspect it for the purpose of discovering a latent defect. And where an employee is directed to work in a certain place, he has the right, in the absence of proof to the contrary, to assume that the place has been made reasonably safe by his employer." *Held*, that this instruction does not mean that proof would have to be made by the employer that the employee's place of work was safe, irrespective of the employee's knowledge of the dangers or defects thereof, but that it merely states the general rule that the employee has a right to act on the presumption that the employer has made his place of work reasonably safe. (Cnkovch v. Success Min. Co., 623.)

5. Instructions permitting the jury to use their own experience and knowledge examined, and *held* not to violate the rule that juries cannot take into consideration facts not shown in evidence. (Cnkovch v. Success Min. Co., 623.)

MASTER AND SERVANT (Continued).**Verdict.**

6. Plaintiff, an experienced miner, thirty-one years old, earning three and a half dollars a day, suffered injuries consisting of a hernia of the direct variety, injury to the pubic region and injury to the sacro-iliac joint. The sacro-iliac injury was severe and of a permanent nature, preventing any labor requiring exercise. *Held*, that a verdict for \$7,500 was not excessive. (*Cnkovch v. Success Min. Co.*, 623.)

7. Where, in an action by a servant for personal injuries, the evidence was conflicting as to whether the rock which struck plaintiff came from the block of ore where plaintiff was working, in which case defendant would not be liable, or came from another portion of the stope, and the jury found for the plaintiff, the verdict will not be disturbed. (*Cnkovch v. Success Min. Co.*, 623.)

See Death.

MEASURE OF DAMAGES.

See Damages, 2.

MINOR CHILDREN.

See Guardian and Ward; Habeas Corpus; Parent and Child.

MISCONDUCT OF COUNSEL.

See Appeal and Error, 53.

MORTALITY TABLES.

See Evidence, 2.

MORTGAGE.**Deed as Mortgage.**

1. Where plaintiff alleges that an instrument purporting to be a deed was in fact a mortgage, and seeks to recover from the grantee the difference between his indebtedness and the amount received by the grantee on sale of the property to a third party, and joins such third party with the grantee as a defendant, in order to affect such third party with notice of the grantee's real interest in the property under such deed, it must be shown that such third party purchased with actual or constructive notice of the fact that the first deed was in fact a mortgage, given for the purpose of securing an indebtedness, and unless this is clearly shown, either by parol evidence or by attendant circumstances, the validity of the deed given by the grantee to such third party cannot be attacked. (*Johansen v. Looney*, 123.)

MORTGAGE (Continued).

2. Where plaintiff alleges that a deed, absolute in form, was in fact intended as a mortgage since it was given as security for a debt, and sues for an amount of money equal to the difference between his actual indebtedness to the grantee and the greater amount received by the grantee upon sale of the property to a third party, although in order to entitle him to recover this surplus he must show the conveyance to have been in fact a mortgage instead of a deed, such proof is only incidental to the real and ultimate issue presented, which is whether plaintiff is entitled to recover a money judgment. (*Johansen v. Looney*, 123.)

See Chattel Mortgages; Limitation of Actions; Waters and Water-courses, 25.

MUNICIPAL CORPORATIONS.*Implied Authority.*

1. Municipalities have implied authority to take whatever lawful means are necessary to carry out their express powers, and to protect their property. (*Boise Development Co. v. Boise City*, 675.)

Sewer Construction Contract With City.

2. Where a party is damaged by breach of a construction contract by the failure of the contractor to complete it, the measure of damages is the cost necessarily and reasonably incurred in completing the contract, whether he does the work himself or employs others to do it for him. (*Boise City v. National Surety Co.*, 455.)

3. Where sewers have been constructed for a municipality and accepted upon condition that the contractor would, upon notice, repair or relay any portion of said sewer should the same prove to be defective, and where thereafter a portion of the same is found to be defective and notice thereof is duly given and the municipality is compelled to repair and complete the system, it is entitled to recover, upon the bond, all amounts necessarily expended upon the portion of the work included in the notice, for materials, labor and salaries of regularly employed officials actually engaged upon such work. (*Boise City v. National Surety Co.*, 455.)

4. Held, that the judgment in this case must be modified, so as to include only such sums for cost of materials, labor and salaries of regularly employed city officials, actually engaged upon the work, as were devoted to the portion of the work included in the notice. (*Boise City v. National Surety Co.*, 455.)

Improvement District Bonds—Assessment—Remedy of Bondholder—Writ of Mandate.

5. Under the provisions of sec. 2238 of the Political Code and amendments thereto, and the other sections of said Political Code

MUNICIPAL CORPORATIONS (Continued).

defining the powers of cities and villages, improvement districts may be organized and improvement district bonds issued for the payment of improvements, and it is made the duty of the mayor and council to levy special assessments each year sufficient to redeem the instalments of such bonds maturing next after their issue, and the funds arising from such assessments shall be applied solely to the redemption of the principal and interest on said bonds, and such bonds are made liens upon the property of the abutting property owners, and if any of such property owners pay their assessments, they are entitled to be credited on their account, as shown by the assessment-roll, both for interest and principal, and the city authorities would have no authority under the provisions of said act to divert such money so paid by a property owner to the payment of the interest or principal due from another abutting property owner who failed or neglected to pay his assessments as required by law. (New First Nat. Bank v. City of Weiser, 15.)

6. When a property owner pays his assessments as provided by said act and the city ordinance, the money arising therefrom must be paid by the city authorities on the interest due on such bonds and on the matured principal, and such property owner is entitled to have his property released from the lien of such bonds to the extent of the payment made, and the money so paid by the property owner cannot be diverted to the payment of the interest or principal due on said bonds from other property owners who fail to pay their assessments. (New First Nat. Bank v. City of Weiser, 15.)

7. The benefit assessed to each lot or parcel of ground abutting on such improvement is liable for the payment of assessments made against such lot or parcel of ground, and if the city fails or refuses to pay such bonds, or promptly collect any such assessments when due, the owner of such bonds may proceed in his own name to collect such assessments and may foreclose any lien thereon in any court of competent jurisdiction, and is authorized to recover in addition to the amount of said bonds and interest, five per centum, together with costs of such suit, including a reasonable sum for attorney's fees. (New First Nat. Bank v. City of Weiser, 15.)

8. Said statute gives the bondholder a plain, speedy and adequate remedy at law whereby he can proceed to collect from each property owner the amount due from him on such bonds. (New First Nat. Bank v. City of Weiser, 15.)

9. Under the provisions of subsec. 12, a lien is created against the property of the abutting owner and the bond owner is authorized to receive, sue for and collect any assessments made against such property through any of the methods provided by law for the collection of assessments for local improvements. (New First Nat. Bank v. City of Weiser, 15.)

MUNICIPAL CORPORATIONS (Continued).

10. Subsec. 4 provides among other things, that the holder of any such bonds shall look only to the fund provided by such assessment for the principal and interest of such bond and gives the bondholder a preference over any mortgage or lien against the land of such abutting owner. (*New First Nat. Bank v. City of Weiser*, 15.)

11. It was not intended that the bondholder could require a property owner who had paid his assessments as levied under said law to pay assessments for other abutting owners who are delinquent in the payment of their assessments. (*New First Nat. Bank v. City of Weiser*, 15.)

12. Said act also provides that the holder of any such bonds shall have no claim for the payment of the same against the city or village except for the collection of the special assessments made for the improvements for which said bonds are issued, and the bondholder's remedy in case of nonpayment is confined to the enforcement of such assessments. This provision of said law is especially made a part of each bond. (*New First Nat. Bank v. City of Weiser*, 15.)

13. The bondholder has no claim against the city on account of the debt created by such bonds, and is given no right as against a land owner who has paid all of his assessments, and the city authorities have no power or right to divert any portion of the principal or interest paid by such taxpayer to the payment of interest and principal owed by a delinquent taxpayer. (*New First Nat. Bank v. City of Weiser*, 15.)

14. The bondholder may proceed in the matter as provided by statute, and can either secure his money from the delinquent taxpayer or obtain title to the property owned by such delinquent, free and clear of all encumbrances. (*New First Nat. Bank v. City of Weiser*, 15.)

15. The plaintiff in this case has a plain, speedy and adequate remedy at law for the collection of any principal or interest due from any property owner who has failed to pay any assessments made by the city authorities, and that being true, the peremptory writ of mandate will not issue. (*New First Nat. Bank v. City of Weiser*, 15.)

Obstructions in Street.

16. The holder of a permit to install an obstruction in a public street or thoroughfare for private purposes acquires no property or contractual right by reason of the issuance to him of such permit, and whenever the city authorities deem it necessary as a police regulation to vacate and revoke such permit, the holder thereof has no alternative, but must comply with the order of revocation. (*Keyser v. City of Boise*, 440.)

MUNICIPAL CORPORATIONS (Continued).

17. *Held*, that the action of the trial court in sustaining the demurrer to the complaint and dismissing the action was not error. (*Keyser v. City of Boise*, 440.)

Care and Maintenance of Parks.

18. The mere grant to a municipality of power to maintain a public park enjoins no absolute duty upon it to do so. (*Boise Development Co. v. Boise City*, 675.)

19. The care and maintenance of parks is primarily a private as opposed to a governmental function. (*Boise Development Co. v. Boise City*, 675.)

Torts.

20. A municipality has a right as a riparian owner, to construct a breakwater for the protection of its property, but if in so doing it so obstructs the stream as to divert it, and thereby damages the property of another riparian owner the municipality is liable for resulting damage. (*Boise Development Co. v. Boise City*, 675.)

21. The liability in such cases does not rest solely upon the narrow ground of negligence, but rather upon the broad legal principle that no one is permitted to so use his own property as to invade the like property rights or cause injury or damage to the property of another. (*Boise Development Co. v. Boise City*, 675.)

— Defense—Ultra Vires.

22. The defense of *ultra vires* can be interposed only where the act complained of was wholly beyond the powers of the municipality. If the wrongful act in question is one which the municipality had the right to do under some circumstances or in some manner, then it is not *ultra vires*. (*Boise Development Co. v. Boise City*, 675.)

23. In order for a municipality to avail itself of the defense that its tort, committed while acting within the scope of its authority, was the result of the exercise of a governmental function, it must appear that such function was the exercise of a legal duty imposed by the state, which it might not omit with impunity but must perform at its peril. (*Boise Development Co. v. Boise City*, 675.)

MURDER.

See Homicide.

NEGLIGENCE.

1. Contributory negligence is an affirmative defense, the burden of establishing which, is on the defendant. (*Graves v. Northern Pacific Ry. Co.*, 542.)

NEW TRIAL.

1. To entitle one to a new trial upon the ground of newly discovered evidence, it must be shown, in the affidavits filed in support of the motion, that the newly discovered evidence could not, with reasonable diligence, have been discovered and produced at the trial. (*Amonson v. Stone*, 656.)

See Appeal and Error, 44.

NONSUIT.

See Dismissal and Nonsuit.

NOTICE OF APPEAL.

See Appeal and Error, 7; Criminal Law, 6.

OFFICERS.*In General.*

1. Sec. 6 of art. 18 of the constitution, prescribing that the legislature shall provide for the election biennially, in each of the several counties of the state, of a county assessor, merely provides for the biennial election of such officer, leaving it to the legislature to prescribe when such election shall be held and when the term of office shall commence and end. (*Clark v. Wonnacott*, 98.)

2. Sec. 32a, Rev. Codes, providing that every officer elected for a fixed term shall hold office until his successor is elected and qualified is not in conflict with sec. 6, art. 18, of the constitution, providing for the biennial election of a county assessor. (*Clark v. Wonnacott*, 98.)

3. Under sec. 32a, Rev. Codes, an incumbent of a public office is entitled to hold such office until his successor is not only duly elected, but also until he has legally qualified for such office. (*Clark v. Wonnacott*, 98.)

4. The death of a person elected to an office before he qualifies therefor does not create a vacancy within the purview of sec. 317, Rev. Codes, since sec. 32a, Rev. Codes, provides that every officer elected for a fixed term shall hold office until his successor is elected and qualified. (*Clark v. Wonnacott*, 98.)

5. Under the provisions of secs. 32a and 317, Rev. Codes, a vacancy in a public office exists only in the event that there is no person lawfully authorized to exercise the duties of such office. (*Clark v. Wonnacott*, 98.)

6. Under the law of this state the person elected to an office does not become the incumbent of such office until he actually qualifies. (*Clark v. Wonnacott*, 98.)

7. *Held*, under the facts of this case no vacancy existed in the office of county assessor of Kootenai county on the second Monday

OFFICERS (Continued).

of January, 1917, which the board of county commissioners of said county were authorized to fill by the appointment of plaintiff. (Clark v. Wonnacott, 98.)

Information for Charging and Collecting Illegal Fees.

8. Where, under sec. 7549, Rev. Codes, authorizing the district court to entertain an information verified by the oath of any person against an officer within its jurisdiction accusing him of charging and collecting illegal fees or with having refused or neglected to perform his official duties, an information charges that the defendant knowingly, wilfully and intentionally failed, neglected and refused to perform her duties, but the record shows that defendant performed her duties, such an information was properly dismissed by the district court. (Corker v. Cowen, 213; Corker v. Ake, 218.)

9. Where an information alleges that defendant knowingly, wilfully and intentionally charged and collected large sums of money for her services as clerk of a school board, in addition to the salary allowed her by law, but it appears that such sums of money were paid to her under a contract for services independent of her duties as said clerk, sec. 7459, Rev. Codes, does not apply. (Corker v. Cowen, 213; Corker v. Ake, 218.)

10. Sec. 7459, Rev. Codes, in so far as it relates to the performance of official duties, is not designed to cover acts of officers amounting to a misfeasance, and such acts are not within the purview of said section. The section is aimed at nonfeasances, that is, failures on the part of officers to act at all, where an act is required by law. (Corker v. Cowen, 213; Corker v. Ake, 218.)

ORDERS OF COURT.

See Adoption.

PARENT AND CHILD.

1. The parents of minor children, being themselves competent to transact their own business, and not otherwise unsuitable, are entitled to the guardianship and custody of said children. (Rev. Codes, sec. 5774.) (Jain v. Priest, 273.)

2. Where children have been removed from the custody of their parents by the probate court because of certain faults of the parents, specified in the findings and order of the court, and the question as to whether the parents have overcome these faults and permanently reformed arises in a subsequent proceeding by which the parents attempt to regain the custody of the children, the material evidence is evidence as to the conduct of the parents since the children were taken from them, and the exclusion of evidence of their

PARENT AND CHILD (Continued).

conduct before that time on the ground of immateriality is not error. (Jain v. Priest, 273.)

3. There being a substantial conflict in the evidence as to whether the parents have reformed and are now suitable persons to have the custody of their minor children, the findings of the district court in favor of the appellants on that point will not be disturbed by this court on appeal. (Jain v. Priest, 273.)

See Adoption.

PARKS.

See Municipal Corporations, 18.

PAROL EVIDENCE.

See Evidence, 3.

PARTNERSHIP.

1. A partner has full power to transact the whole business of the firm of which he is a partner, and may bind his partner or partners in such transactions as entirely as himself, and his assignment in good faith of accounts payable to the firm, to a creditor of the firm in payment of partnership indebtedness, is binding upon the partnership. (Bates v. Price, 521.)

PAYMENT.

1. The extension of time by a creditor within which to pay an old obligation is as much a consideration and as much an extension of credit as the granting of a new loan. (Pettengill v. Blackman, 241.)

PERMIT.

See Waters and Watercourses, 2.

PLEADING.***In General.***

1. A defective allegation of a good cause of action, in the absence of a demurrer, is cured by a verdict and judgment. (The Mode, Ltd., v. Myers, 159.)

2. Where plaintiff has waived his right to introduce evidence attacking the due execution or genuineness of a written instrument pleaded and set forth in defendant's answer, by failing to file an affidavit denying the same, as required by sec. 4201, Rev. Codes, such omission does not place him in the position of admitting the validity of such instrument, but he may interpose any evidence on

PLEADING (Continued).

the trial tending to show that such instrument, irrespective of its due execution and genuineness, is void, invalid and of no effect for the purpose offered. (*Pettengill v. Blackman*, 241.)

Amendment.

3. An amendment to a complaint will not be permitted where the complaint, even if so amended, would fail to state a cause of action, under the general rule that amendments to pleadings should be permitted in furtherance of justice. (*Davis v. State*, 137.)

4. An application to amend complaint while motion for nonsuit is pending is addressed to the sound discretion of the trial court. (*The Mode, Ltd., v. Myers*, 159.)

See Contracts, 9; Corporations, 17.

PRAECIPE.

See Appeal and Error, 11.

PRESUMPTIONS.

See Appeal and Error, 31; Criminal Law, 8.

PRINCIPAL AND AGENT.***In General.***

1. Agency may be implied where one person holds out another as his agent and thereby invests him with apparent or ostensible authority as such; it may be implied from prior habit or course of dealing of a similar nature between the parties, or from a previous agency, as where the alleged principal has previously employed the alleged agent as such in transactions similar to the one in question. (*Amonson v. Stone*, 656.)

Fraud of Agent.

2. The fraud of an agent is within the course of his employment where, in committing it, he is endeavoring to promote his principal's business within the scope of the actual or apparent authority conferred upon him for that purpose. (*Davenport v. Burke*, 599.)

3. Acts of fraud by an agent, committed in the course of his employment, are binding on his principal, even though the principal did not in fact know of or authorize their commission. (*Davenport v. Burke*, 599.)

4. A principal who retains benefits derived from the fraudulent conduct of his agent is chargeable with the instrumentality employed by the latter in carrying out the fraudulent purpose, and will not be permitted to disclaim responsibility and retain the fruits of the fraudulent transaction. (*Davenport v. Burke*, 599.)

PROBATE JUDGE.

See Adoption.

PUBLIC LANDS.*Grant in Aid of Railroads.*

1. While the right of way granted by sec. 2 of the act of Congress of July 2, 1864 (13 Stats. at L. 365), is being used by the successor to the grantee for railroad purposes title to unused portions, lying along the tracks within the boundaries of the grant, cannot be acquired, as against such successor, by adverse possession. (Crandall v. Goss, 661.)

2. That grant was of a limited fee made on an implied condition of reverter in the event the grantee, or its successors, ceased to use or retain the land for the purpose for which it was granted. (Crandall v. Goss, 661.)

3. Sec. 4538, Rev. Codes, provides: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." This section applies to public lands held or claimed adversely by an individual subject only to the paramount title of the United States. (Crandall v. Goss, 661.)

4. After a contract has been made between the United States and a state whereby lands are segregated from the public domain pursuant to the Carey Act of Congress, such lands are reserved from sale by the United States and are not public lands within the meaning of the act of Congress of March 3, 1875, granting to railroads rights of way through the public domain, and are not subject to location thereunder. (Oregon Short Line R. R. Co. v. Williams, 715.)

PUBLIC OFFICERS.

See Officers.

PUBLIC RANGE.

See Animals; Damages.

PURCHASERS.

See Execution.

QUIETING TITLE.

1. Held, that in this case an action to quiet title is a proper form of action to attain the end desired, as shown by the pleadings. (Pettengill v. Blackman, 241.)

2. In a suit to quiet title the plaintiff has a right to have every adverse interest determined, and anyone claiming to hold any in-

QUIETING TITLE (Continued).

terest in the property in question, which would be adverse to plaintiff's interest, may be required to come in and set up the nature of his interest and its source. The interest of a mortgagee is an interest adverse to the holder of a legal title. (*Pettengill v. Blackman*, 241.)

3. Where a judgment debtor causes real property which he has purchased to be conveyed by his vendor direct to a third person, and the transfer of his interest to such third person is fraudulent and void as to creditors, and the judgment creditor levies upon and sells such property as the property of the judgment debtor, the holder of the sheriff's deed on such sale may, under sec. 4538, Rev. Codes, maintain an action as owner to quiet title. (*The Mode, Ltd., v. Myers*, 159.)

RAILROADS.***Railway Crossings.***

1. The failure of a railway company to comply with the provisions of sec. 2821, Rev. Codes, requiring such company to ring a bell, or sound a whistle, when approaching a place where the railroad crosses a street, road, or highway, constitutes negligence *per se*. (*Graves v. Northern Pacific Ry. Co.*, 542.)

2. A railway corporation is liable for all damages, sustained by any person, caused by its locomotive, trains, or cars, where the provisions of sec. 2821, Rev. Codes, are not complied with, unless the person injured is guilty of contributory negligence. (*Graves v. Northern Pacific Ry. Co.*, 542.)

3. It is the duty of a person crossing a railroad track to exercise such care as would be exercised by a man of ordinary prudence under like circumstances. (*Graves v. Northern Pacific Ry. Co.*, 542.)

4. The presumption is that one, who is killed while attempting to cross a railroad track, was exercising due and proper care for his protection. (*Graves v. Northern Pacific Ry. Co.*, 542.)

5. It is the duty of one about to cross a railroad track to look and listen, but it is not negligence *per se* to fail to stop, and where the facts are disputed the question of contributory negligence is one of fact, to be determined from all the facts and circumstances in evidence. (*Graves v. Northern Pacific Ry. Co.*, 542.)

6. The evidence showed that deceased, who was driving an automobile stopped some distance from the crossing, went to the track, looked and listened; drove to within a few feet of the track, there stopping to look and listen; proceeded slowly, on the lookout for trains, and was not attempting to make the crossing ahead of the train. *Held*, sufficient to sustain a finding that deceased was using due care and was not guilty of contributory negligence. (*Graves v. Northern Pacific Ry. Co.*, 542.)

RAILROADS (Continued).*Duty as to Gates and Fences.*

7. The gates at private railroad crossings provided for in section 2815, Rev. Codes, as amended (Sess. Laws 1911, p. 706), are a part of the fence which it is made the duty of the railroad company to maintain, and it is equally its duty under said statute to keep such gates securely closed, so as to afford the same protection from stock getting on its right of way at such places as at other points. (*Saccamonno v. Great Northern Ry. Co.*, 513.)

8. The fact that the legislature in amending section 2815, Rev. Codes, omitted the latter portion of said section, as follows: "No recovery can be had on account of stock injured or killed which come upon said highway [right of way] by reason of failure to keep such gates closed," indicates the legislative intent to require railroad companies to maintain gates at private crossings and keep them closed, in order to relieve themselves from liability under said section as amended, in so far as third parties and the public are concerned. (*Saccamonno v. Great Northern Ry. Co.*, 513.)

9. The wisdom or policy of a legislative act which imposes upon railroad companies a duty to keep gates closed for private crossings of their tracks and makes them liable for failure without knowledge to keep such gates closed, is not a matter for judicial consideration, nor will the court interfere with the legislative policy of imposing liability upon railroad companies for failure to keep their rights of way fully protected, where under the statute it is their duty to fence their tracks and keep their gates closed. (*Saccamonna v. Great Northern Ry. Co.*, 513.)

See Contracts, 6; Public Lands, 1.

RANGES.

See Animals.

RAYL.

See Waters and Watercourses, 8, 23.

RECEIVERS.

1. An order of court appointing a receiver and defining his authority, which specifies the property to be taken possession of by such receiver, closing with the clause: "and all that goes with the livery business connected with the Charles L. Hollar barn," cannot be so construed as to include outstanding accounts or bills receivable, in the absence of the specific inclusion of such accounts. (*Bates v. Price*, 521.)

2. *Held*, that appellant had no authority as receiver to collect the accounts in question, and that when he accepted them for collec-

RECEIVERS (Continued).

tion from respondent he did so in his private capacity, and was therefore liable to respondent for the amounts collected thereon. (*Bates v. Price*, 521.)

REFORMATION OF INSTRUMENTS.

1. Where the suit to reform the contract is incidental to another action, no prior demand for reformation need be made. This is especially true where it clearly appears that such a demand would be refused. (*Bowers v. Bennett*, 188.)

2. *Held*, that in this action it was not necessary for respondent to return to appellant the initial payment made upon the purchase price of the land or the interest on deferred payments as a condition precedent to the bringing of the suit for the reformation of the contract. (*Bowers v. Bennett*, 188.)

3. In this state the law requiring a party to establish his case "beyond a reasonable doubt" applies only in criminal cases and not in a suit for the reformation of a contract, and the case of *Houser v. Austin*, 2 Ida. 204, 10 Pac. 37, so far as it is in conflict herewith, is overruled, and the case of *Panhandle Lumber Co. v. Rancour*, 24 Ida. 603, 135 Pac. 558, approved and followed. (*Bowers v. Bennett*, 188.)

REMEDIES.

See Election of Remedies.

RESCISSION OF CONTRACT.

See Contracts, 17.

RES JUDICATA.

See Waters and Watercourses, 32.

REVIEW, WRIT OF.

1. In proceedings upon writ of review, the constitutionality of the statute upon which the inferior tribunal, the action of which is reviewed, based its authority cannot be passed upon. (*Weiser Nat. Bank v. Washington County*, 332.)

See Appeal and Error.

SALES.***In General.***

1. Where, under the provisions of a contract of sale, the goods are to be manufactured by the vendor, the measure of damage for a breach of the contract by the vendee is the difference between the

SALES (Continued).

contract price and the cost of manufacture and delivery. (*St. Regis Lumber Co. v. Turner Lumber & Mfg. Co.*, 555.)

2. Where a wife purchased purported county warrants, through her husband as her agent, who was at the time of such purchase a county commissioner, she must be presumed to have done so with the knowledge that under the provisions of secs. 258 and 260, Rev. Codes, the county treasurer would be without authority to pay such warrants, and she is not in a position to complain that there was no consideration. (*Libby v. Pelham*, 614.)

3. Where one purchases county warrants from the payee thereof, which warrant issue is thereafter held by the district court, in a proper action, to be null and void, and the county treasurer enjoined from paying the same, and the order of the county commissioners, directing the auditor to issue the warrants, is reversed and vacated, there is a total failure of consideration from the seller of such warrants, since the purchaser did not in fact receive the county warrants he supposed he was buying, but only pieces of worthless paper. (*Milner v. Pelham*, 594.)

Breach of Warranty.

4. Where, in an action by the vendor to recover the purchase price of property sold, the purchaser, as a defense, relies upon a breach of express warranty and an election to rescind the contract, it is immaterial whether or not the vendor acted in good faith when he made the representations leading up to the sale. (*Raft River Land & Livestock Co. v. Laird*, 804.)

5. In such a case it is not the duty of the purchaser to investigate the truth of the statement constituting the warranty. (*Raft River Land & Livestock Co. v. Laird*, 804.)

6. What is a reasonable time within which a purchaser, who elects to rescind a contract of sale because of a breach of warranty must return, or offer to return, the property purchased, is a question of fact to be determined by the jury. (*Raft River Land & Livestock Co. v. Laird*, 804.)

See Waters and Watercourses, 8.

SCHOOL LANDS.

See Waters and Watercourses, 8.

SCHOOLS AND SCHOOL DISTRICTS.***In General.***

1. Chap. 47, Sess. Laws, 1917, p. 106, prescribing qualifications of voters at bond elections in school districts, is unconstitutional and void because it purports to qualify to vote those who belong to

SCHOOLS AND SCHOOL DISTRICTS (Continued).

classes prohibited and disqualified from voting by sec. 3, art. 6, of the constitution. (*Griffith v. Owens*, 647.)

2. Sec. 4 of art. 8 and sec. 4 of art. 12 of the constitution are intended to prevent any county, city, town or other municipal corporation from becoming interested in any private enterprise or from using funds derived by taxation in any manner in aid of any private enterprise, with the exceptions provided for in sec. 4 of art. 12. (*School District No. 8 v. Twin Falls County Mutual Fire Ins. Co.*, 400.)

3. A school district is a municipal corporation within the meaning of sec. 4 of art. 12 of the constitution. (*School District No. 8 v. Twin Falls County Mutual Fire Ins. Co.*, 400.)

School Superintendent and Certificates.

4. The constitution of this state provides that the qualifications for the office of county superintendent of public instruction shall be fixed by law. (*People v. Kadletz*, 698.)

5. When the law prescribes the qualifications necessary for a person to become eligible to the office of county superintendent of public instruction, and included among such qualifications is a requirement that a candidate for the office must be a holder of a state or state life certificate, a certificate is intended which at least meets the requirements specified in the law for state certificates. (*People v. Kadletz*, 698.)

6. A certificate issued by the county superintendent of public instruction in 1898, valid for three years in all schools of the state, must be held to be of a lower grade than a state certificate within the meaning of the law prescribing the qualifications of county superintendent of public instruction. (*People v. Kadletz*, 698.)

7. A certificate issued by the state board of education, good for two years and not valid in high schools, cannot be said to be a state certificate within the meaning of the statutes of this state. (*People v. Kadletz*, 698.)

School District as Member of County Mutual Fire Insurance Company.

7a. A school district cannot, under sec. 4 of art. 8 and sec. 4 of art. 12 of the constitution, become a member of a county mutual fire insurance company organized under the Laws of 1911, p. 768, as amended Laws of 1913, p. 129. (*School District No. 8 v. Twin Falls County Mutual Fire Ins. Co.*, 400.)

8. The liability of a member of a county mutual fire insurance company is unlimited, and therefore a contract by which a school district seeks to become a member of such organization is void under sec. 3 of art. 8 of the constitution. *Held*, that a contract of insurance between a school district and a county mutual fire insurance

SCHOOLS AND SCHOOL DISTRICTS (Continued).

company is void, and will form no basis for recovery as against the insurance company for loss by fire. (*School District No. 8 v. Twin Falls County Mutual Fire Ins. Co.*, 400.)

Division and Consolidation of School Districts.

9. On an appeal to the district court from an order made by the board of county commissioners, extrinsic evidence is admissible to determine upon which petition the county commissioners acted. (*Clay v. Board of County Commissioners*, 794.)

10. Where a board of county commissioners has consolidated two adjacent school districts, a succeeding board may, upon proper proceedings, divide the same. (*Clay v. Board of County Commissioners*, 794.)

11. A district formed by the union of two or more existing districts does not occupy any different position after consolidation and is not invested with any different or additional powers than a district created from unorganized territory. (*Clay v. Board of County Commissioners*, 794.)

12. Where a school district has been organized by an order of the board of county commissioners, a future board has express statutory power to change the boundaries or divide the district upon a proper petition therefor being presented. (*Clay v. Board of County Commissioners*, 794.)

13. The recommendation of the superintendent of public instruction in writing is not necessary to give the board of county commissioners jurisdiction to divide a school district. (*Clay v. Board of County Commissioners*, 794.)

— *Appeal.*

14. An appeal to the district court from an order made by the board of county commissioners must be predicated upon the existence of such an order, and, upon the trial in the district court, the appellant cannot be heard to say that the order appealed from did not represent any action of the board. (*Clay v. Board of County Commissioners*, 794.)

SHEEP.

See *Animals*.

SPECIAL ASSESSMENTS.

See *Waters and Watercourses*, 33.

SPECIFIC INTERROGATORIES.

See *Trial*, 1.

STATE ENGINEER.

See Waters and Watercourses.

STATE LANDS.

See Taxation, 1.

STATES.

Claim Against.

1. Sec. 109, Rev. Codes, limits the time within which a claim against the state may be presented to the state board of examiners to two years after the claim has accrued. After the expiration of this period the state board of examiners is without jurisdiction to consider the claim. (Davis v. State, 137.)

2. Under the provisions of sec. 10, art. 5, and sec. 18, art. 4, of our constitution the method prescribed for presenting and prosecuting to a conclusion the claims against the state is that in the first instance such claim must be presented in proper form to the state board of examiners; if rejected by said board the supreme court has original jurisdiction of an action upon a proper claim and may in some cases give a recommendatory judgment, which in turn must be presented to the legislature to be by it allowed or disallowed. (Davis v. State, 137.)

3. The fact that under sec. 10, art. 5, of the constitution the supreme court has original jurisdiction to hear claims against the state does not relieve claimants of the obligation in the first instance of presenting their claims to the state board of examiners. (Davis v. State, 137.)

4. The word "claim" as used in art. 5, sec. 10, of the constitution of this state does not include any claim for damages caused by the careless or negligent acts of the state's servants, employees or agents, and in the absence of any statute expressly making the state liable in such cases no such liability exists. (Davis v. State, 137.)

5. Under sec. 109, Rev. Codes, no claim which is not provided for by law may be presented, audited, set off or sued upon. (Davis v. State, 137.)

Suit Against.

6. States cannot be sued without their consent, and when by constitutional or statutory provisions the state has permitted itself to be sued, such permission does not render the state liable for the careless or negligent acts of its servants, employees or agents in the absence of any statute expressly fixing such liability upon a state. (Davis v. State, 137.)

STATES (Continued).

7. Complaint of D. alleged that the state of Idaho owned and operated an irrigation system; that by reason of the negligence and carelessness of the state and its servants, employees and agents a ditch of said system broke, causing large quantities of water to flow upon, over and across D.'s land, resulting in the alleged damage. *Held*, not to state a cause of action as against the state, and not to disclose a state of facts giving rise to a "claim" within the meaning of art. 5, sec. 10, of the constitution. (*Davis v. State*, 137.)

8. *Held*, that in the absence of a statute or constitutional provision making the state as a proprietor liable for the careless or negligent acts of its servants, employees or agents, this court is without jurisdiction to grant any relief to plaintiff, under the facts alleged in plaintiff's complaint. (*Davis v. State*, 137.)

See Chattel Mortgages, 4; Waters and Watercourses, 8, 26.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Corporations, 17.

STATUTES.

Approval of Bill, Signing, and Amendment.

1. Under sec. 10 of art. 4 of the constitution, every bill passed by the legislature shall, before it becomes a law, be presented to the Governor. If he approve, he shall sign it and thereupon it shall become a law. *Held*, that where a bill, properly certified by the presiding officers of the two Houses of the legislature, was presented to the Governor and approved and signed by him, no amendment or alteration of the bill so approved and signed can be made. (*Katerndahl v. Daugherty*, 356.)

Construction.

2. Changes made by a revision of a statute, as distinguished from legislative amendment, will not be regarded as altering the law as it existed previous to revision, unless it is clear that such was the intention, and if the statute as revised is ambiguous or is susceptible of two constructions, reference may be had to prior statutes for the purpose of ascertaining intention. (*Libby v. Pelham*, 614.)

3. Sec. 258, Rev. Codes, was a part of an act entitled, "An act to prevent officers from dealing in certain securities." The use of the word "dealing" clearly indicates an intention on the part

STATUTES (Continued).

of the legislature to preclude officers from dealing in such securities in any manner whatsoever, whether for their own use or benefit or that of any other person. (*Libby v. Pelham*, 614.)

4. When possible, statutes should be construed with a view to their being held constitutional and valid, but where they are so plain they admit of no construction other than their bare reading suggests, no other interpretation is possible. (*Griffith v. Owens*, 647.)

5. Sec. 5 of the Revised Statutes of 1887 and sec. 5 of the Rev. Codes of 1909, both provide that the provisions of said Revised Statutes and Revised Codes, "so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments." (*Libby v. Pelham*, 614.)

6. The law of 1909 (Sess. Laws 1909, p. 211, as amended by Sess. Laws 1913, p. 550) regulating the use and sale of stallions, was not passed for the purpose of raising revenue, but is a police regulation designed to protect those who purchase the services of or buy stallions. (*Zimmerman v. Brown*, 640.)

See *Mandamus*, 8; *Officers*, 1.

STREETS.

See *Municipal Corporations*, 16.

SUIT.

See *States*, 6.

TAXATION.

1. *Held*, where one purchases state land under an instalment contract, his interest, which is subject to taxation, under secs. 1586 and 1643, Rev. Codes, bears the same relation to the full cash value of the land as the amount actually paid upon his contract bears to the total purchase price. (*Lewis v. Christopher*, 197.)

TORTS.

See *Municipal Corporations*, 20.

TRANSCRIPT.

See *Appeal and Error*, 12.

TRIAL.

1. Where specific interrogatories are submitted to a jury in either a legal or equitable action, the findings of the jury in response thereto are not binding upon the court, which may disregard such

TRIAL (Continued).

findings if they are clearly against the evidence, and find the facts as shown by the evidence before it. (*Rees v. Gorham*, 207.)

2. When a jury brings in a verdict which by inadvertence expresses a conclusion manifestly at variance with the real intention of the jury, it is the duty of the court, upon ascertaining such mistake, to send the jury back in order that they may return a verdict in proper form. (*Bates v. Price*, 521.)

See *Jury*, 1-3.

TRUSTS.

1. Constructive trusts are raised by equity for the purpose of working out right and justice, where there was no intention of the trustee to create such a relation. Where a party obtains the legal title to property by fraud, violation of confidence, or of a fiduciary relation, or in any other unconscientious manner, so that he cannot equitably retain it, because it really belongs to another, equity will impress a constructive trust upon it in favor of the one who in good conscience is entitled to it, and will recognize him as the beneficial owner. (*Davenport v. Burke*, 599.)

ULTRA VIRES.

See *Municipal Corporation*, 22.

USURY.

1. When a contract is usurious by the laws of the state wherein it was made, but not according to those of the state wherein it is to be performed, the parties will be presumed to have contracted with reference to the laws of the latter state, unless it appears that in fixing the place of payment there was bad faith or an intention to evade the usury laws of the former. (*Zimmerman v. Brown*, 640.)

VACATING DEFAULTS.

See *Judgment*, 6.

VACATING JUDGMENTS.

See *Judgment*, 8, 9.

VENUE.

1. When a motion for a change of venue, on the ground of the bias and prejudice of the trial judge, is supported by a sufficient showing, it is the duty of such judge to grant a change of venue, and such duty is mandatory and not discretionary. (*Callahan v. Callahan*, 431.)

VENUE (Continued).

2. A direct allegation of the fact of prejudice and bias on the part of a trial judge, based on the belief of affiant, and accompanied by a statement of the facts on which the belief is based as complete as the nature of the case admits of, constitutes a sufficient showing of bias and prejudice, to sustain an order for a change of venue on that ground, and this is particularly true where the trial judge expressly finds that he is disqualified and that sufficient grounds exist therefor. (*Callahan v. Callahan*, 431.)

3. An order granting a change of venue in a cause pending in a district court should, in the absence of an agreement, transfer the cause to the nearest court, judicial district and county, "where the like objection or cause for making the order does not exist," and such order should not designate the judge before whom such cause should be tried. (*Callahan v. Callahan*, 431.)

4. *Held*, order granting a change of venue affirmed, with directions to the trial court to amend same in conformity with the views herein expressed. (*Callahan v. Callahan*, 431.)

5. *Held*, where an appeal from an order of the district court, denying a motion for a change of venue and continuing the cause for the term, is prosecuted upon the ground that the trial judge is disqualified, and where upon the hearing of such appeal it appears that such disqualification has ceased to exist because such trial judge is no longer an incumbent in office, this court will take judicial notice of that fact and the appeal will be dismissed, for the reason that no actual relief can now be afforded other than the awarding of costs, and costs being merely incidental to a judgment, do not constitute a matter of controversy sufficient to warrant an appellate court in entertaining an appeal. (*Coburn v. Thornton*, 347; *Bennett v. Thornton*, 350.)

VENDOR AND PURCHASER.

1. Where time is agreed to be of the essence of a contract for the sale of real estate, the fact that the vendor accepts an interest payment a short time after it is due does not operate as a waiver of promptness in future payments. (*Bowers v. Bennett*, 188.)

VERDICT.

See Appeal and Error, 32, 36.

WATERS AND WATERCOURSES.*Appropriation of Water.*

1. Under sec. 3 of art. 15 of the constitution, those using water for domestic purposes have a preference over those claiming water for any other use. But in case the water has already been appro-

WATERS AND WATERCOURSES (Continued).

priated for another inferior use, the use for a superior purpose is subject to the provision of law regulating the taking of private property for public use. (*Basinger v. Taylor*, 289.)

2. A permit issued by the state engineer is not a water right, and is not in itself evidence of appropriation of water. (*Basinger v. Taylor*, 289.)

3. Under a pleading claiming title to the public waters of this state, a decree must be based upon the amount of water actually diverted and applied to beneficial use. (*Basinger v. Taylor*, 289.)

4. An appropriator of water who seeks to invoke the doctrine of relation in order that the date of priority of his appropriation shall relate back to the date of the initiation of his appropriation must show a substantial compliance with all the provisions of the statute, and also final consummation of the appropriation as defined by the statute, and can invoke the doctrine only to the extent of the completion of such appropriation. (*Basinger v. Taylor*, 289.)

5. The holder of a permit issued by the state engineer for the appropriation of water is not entitled to an injunction to prevent the diversion of waters from a stream, unless he shows that he is in a position to make beneficial use of such water. (*Basinger v. Taylor*, 289.)

6. A person entitled to the use of water may change the place of diversion if others are not injured by such change. The right to change the place of diversion is subject to the protection of the rights of other appropriators from the stream. (*Basinger v. Taylor*, 289.)

7. Under the provisions of sec. 3, art. 15, of the state constitution, the right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied, and priority of appropriation shall give the better right as between those using the water. (*State v. Twin Falls Salmon River Land & Water Co.*, 41.)

Carey Act Lands—Appropriation of Water—Construction Company—Contracts—Sale of Water—Writ of Mandate to Compel Sale of Water.

8. Under the act of Congress known as the Carey Act and the amendments thereto (28 U. S. Stats. 372-422), and the statutes of this state applicable thereto, the state made application to the Secretary of the Interior for the segregation of about 150,000 acres of land within what is known as the Twin Falls-Salmon River, Carey Act project, which application was approved on the 10th day of April, 1908, and a contract was entered into between the United States government and the state on that date. The Twin Falls-

WATERS AND WATERCOURSES (Continued).

Salmon River Land and Water Company was a corporation organized for the construction of a reservoir and canal system for the irrigation of said lands, and the state entered into a contract with said corporation on April 30, 1908, for the construction of the proposed irrigation works, whereby said construction company agreed to construct said works in accordance with certain plans and specifications; and it is provided, among other things in said contract, that shares of water rights should be sold to persons purchasing any portions of any state school lands within said project which were susceptible to irrigation and reclamation from said system, at a price not to exceed thirty dollars per share, provided that said water rights were purchased within one year after the purchase of the lands from the state, and not exceeding forty dollars per share at any time thereafter. The construction company proceeded and constructed said works under the supervision of the state authorities. During the period of construction it was ascertained that the available supply of water for said project was less than one-half what it had theretofore been determined by the land Department of the government and the state authorities, and was agreed between the state and the construction company that not more than 80,000 acres of said Carey Act lands should be put on the market for sale and settlement. About 73,000 acres of said land were sold by the state to prospective settlers, about 14,000 acres of which thereafter became forfeited because the purchasers failed to comply with the law, thus leaving about 59,000 acres; and on later investigations of the available water supply for the lands within said project, it was ascertained that there was not sufficient water to reclaim the Carey Act lands which had already been sold. Thereafter on June 11, 1915, the state sold 160 acres of its school lands within said project to the plaintiff Rayl, and thereupon Rayl demanded of the construction company and also of the canal company that they sell to him a water right for said land, which they refused to do. *Held*, under the facts that the peremptory writ of mandate will not issue to compel said corporation to sell to him the water right demanded. (State v. Twin Falls-Salmon River Land & Water Co., 41.)

9. The construction company was permitted, under the law, to appropriate the water for said land for the purpose of transferring it to the settlers within said project for their use and benefit in connection with the irrigation system, it being intended that the settlers should ultimately own the entire project, the irrigation works and the water rights. The Construction Company was only a trustee in the appropriation of the water. (State v. Twin Falls-Salmon River Land & Water Co., 41.)

10. Under the provisions of sec. 1618, Rev. Codes, the state engineer is required to determine and report whether there is suf-

WATERS AND WATERCOURSES (Continued).

ficient unappropriated water in the source of supply and whether or not a permit to divert and appropriate water through the proposed works has been approved by him, and whether the capacity of such works is adequate to reclaim the land described. (*State v. Twin Falls-Salmon River Land & Water Co.*, 41.)

11. Sec. 1619, Rev. Codes, provides that no request for the segregation of lands on which the state engineer has reported adversely as to the water supply, feasibility of the construction, the cost or capacity of the works, or as to the character of the lands sought to be irrigated, shall be approved by the board. (*State v. Twin Falls-Salmon River Land & Water Co.*, 41.)

12. *Held*, that the entire plan is one of complete state supervision and control. (*State v. Twin Falls-Salmon River Land & Water Co.*, 41.)

13. In carrying out the provisions of the Carey Act and the statutes of this state applicable thereto, there are three contracts required: One between the government and the state, known as the state contract; one between the state and the construction company, known as the construction company contract; and one between the construction company and the settlers, known as the settlers' contract. (*State v. Twin Falls-Salmon River Land & Water Co.*, 41.)

14. The state acts in said matter as the agent or trustee for the settlers. (*State v. Twin Falls-Salmon River Land & Water Co.*, 41.)

15. The general plan is that the cost of reclamation of such lands shall be assessed as a benefit against the land, to be paid by the settler, and that such benefit is assessed through the medium of the state board of land commissioners. (*State v. Twin Falls-Salmon River Land & Water Co.*, 41.)

16. Under the provision of the Carey Act and the state law applicable thereto, the proper officers, both of the government and state, must determine in advance the sufficiency of the water supply, the character and kind of the system of irrigation that must be constructed, and the price to be charged the settlers for an interest therein. These things must all be done before the execution of the contract between the state and the construction company. (*State v. Twin Falls-Salmon River Land & Water Co.*, 41.)

17. Where certain officers of the government and the state are authorized by law to pass upon matters of the character involved in this case, their decision is conclusive where no question of fraud is raised. (*State v. Twin Falls-Salmon River Land & Water Co.*, 41.)

18. The time to ascertain whether the lands are of a character subject to segregation under the Carey Act and whether there is water available for their reclamation is prior to segregation. (*State v. Twin Falls-Salmon River Land & Water Co.*, 41.)

WATERS AND WATERCOURSES (Continued).

19. The question of the sufficiency of the water supply for the irrigation of a certain tract of land must of necessity be a matter of approximate estimate. (*State v. Twin Falls-Salmon River Land & Water Co.*, 41.)

20. Under the provisions of sec. 3289, Rev. Codes, any water company or corporation is forbidden to contract or sell more water than it is entitled to, and must not sell more water than it has. (*State v. Twin Falls-Salmon River Land & Water Co.*, 41.)

21. By the terms of the state contract, the construction company agreed to sell shares of water stock "to the extent of the water rights to which it is entitled . . . but in no case shall water rights or shares be dedicated to any land before mentioned or sold beyond the carrying capacity of the canal or in excess of the appropriation thereof." (*State v. Twin Falls-Salmon River Land & Water Co.*, 41.)

22. Held, that the cases of *State v. Twin Falls Canal Co.*, 21 Ida. 410, 121 Pac. 1039, and *State v. Twin Falls Canal Co.*, 27 Ida. 728, 151 Pac. 1013, have no application to cases where the water supply is not adequate or sufficient and are not applicable to the facts of this case. (*State v. Twin Falls-Salmon River Land & Water Co.*, 41.)

23. Since the state and Rayl knew that the water supply was insufficient at the time said state land was sold and purchased, an equitable estoppel arises against them, and *held*, under the facts and the law, that the state is not entitled to a priority of right for of said water for the land sold to Rayl. (*State v. Twin Falls-Salmon River Land & Water Co.*, 41.)

Carey Act Lands—Estoppel.

24. Under the facts of this case, *held*, that an estoppel arises against the state, as no good reason can be offered why the state in its dealings in this matter should not be affected by considerations of morality and right which ordinarily bind the conscience, since the action of a sovereign state ought to be characterized by a more scrupulous regard to justice and higher morality than belongs to the ordinary transactions of individuals, and it clearly appears from the facts of this case that the state should act with fidelity and integrity toward the settlers. (*State v. Twin Falls-Salmon River Land & Water Co.*, 41.)

— Superiority of Mortgage Lien.

25. Where a Carey Act construction company enters into a contract with a desert land entryman, whereby it furnishes water to him which is based upon, and the right to the use of which becomes appurtenant to, the land, and issues to him shares of stock in an

WATERS AND WATERCOURSES (Continued).

operating company which it is intended shall ultimately become the owner of the irrigation system, and retains possession of the shares as security for the payments to be made therefor, but does not record the contract, and the entryman afterward mortgages the land to a third party who, without actual notice of any lien or claim of the construction company, acquires such mortgage and records it, the lien created by the mortgage attaches to the water right and to the shares of stock, and is superior to the lien or claim of the construction company. (*Ireton v. Idaho Irrigation Co.*, 310.)

Carey Act Project—How State Deals With.

26. The state of Idaho in dealing with a Carey Act project acts by virtue of its sovereignty and not in the capacity of a private owner. (*State v. Twin Falls-Salmon River Land & Water Co.*, 75.)

27. The state in dealing with a Carey Act project is not dealing in its governmental capacity, but in its proprietary capacity—in its capacity as a private owner improving his own property. (*State v. Twin Falls-Salmon River Land & Water Co.*, 41.)

Irrigation Districts—Assessment.

28. Where the steps taken by the officers of an irrigation district in levying assessments and spreading the same upon the assessment-roll, and matters connected therewith, are regular, upon failure to pay the assessment, the right of sale follows. (*Holland v. Avondale Dist.*, 479.)

29. The treasurer of an irrigation district is under an affirmative statutory duty to accept nothing but "lawful money of the United States" in payment of assessments. (*Holland v. Avondale Irr. Dist.*, 479.)

30. An agreement whereby a treasurer of an irrigation district is to accept a tender other than "lawful money of the United States," as provided by statute, is a legal nullity. (*Holland v. Avondale Irr. Dist.*, 479.)

31. Where an assessment is duly levied by an irrigation district, and the same is unpaid and delinquent, it is the duty of the treasurer under the law to proceed to sell the land. (*Holland v. Avondale Irr. Dist.*, 479.)

32. Where an irrigation district has been regularly organized and the benefits for the cost of the works apportioned to the land, such matters become *res adjudicata* and are not subject to collateral attack. (*Holland v. Avondale Irr. Dist.*, 479.)

33. Special assessments are not provided for in secs. 2407 to 2409, Rev. Codes (amended Laws 1911, p. 200), and are therefore to be levied and collected in conformity with the procedure for levying and collecting assessments for the payment of principal and in-

WATERS AND WATERCOURSES (Continued).

terest of bonds, and the assessment is to be listed and carried out in the assessment-books in the same proportion as the assessment of benefits for the cost of the works. (*Holland v. Avondale Irr. Dist.*, 479.)

See Drains, 1-19.

WARD.

See Guardian and Ward.

WARRANTY.

See Sales, 4.

WITNESSES.

1. Qualification of witnesses to testify as experts must be determined in the first instance by the trial court, and unless it is apparent that the trial court was in error in permitting a witness to testify as an expert, the judgment will not be reversed. (*Austin v. Brown Brothers Co.*, 167.)

WORK AND LABOR.

1. Where one enters into a contract to labor with the understanding that the proceeds of said labor shall be paid *pro rata* to creditors, a subsequent assignment of the wages earned, without the consent of the said creditors, is invalid in that there is nothing owing under said contract upon which the assignment could operate. (*Green v. Consolidated Wagon & Machine Co.*, 359.)

WRITS.

See Habeas Corpus; Review, Writ of.

